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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA
vs.
JEFFREY ALEXANDER STERLING,
Defendant.
.

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

VOLUME VII

APPEARANCES:

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

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I N D E X

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1 | PROCEEDINGS

2 (Defendant present, Jury out.)

3 THE CLERK: Criminal Case 10-485, United States of
4 America v. Jeffrey Alexander Sterling. Would counsel please
5 note their appearances for the record.

6 MR. TRUMP: Good morning, Your Honor. Jim Trump on
7 behalf of the United States.

8 MR. OLSHAN: Good morning, Your Honor. Eric Olshan
9 on behalf of the United States.

10 MR. FITZPATRICK: Good morning, Your Honor. Dennis
11 Fitzpatrick on behalf of the United States.

12 THE COURT: Good morning.

13 MR. POLLACK: Good morning, Your Honor. Barry
14 Pollack on behalf of Mr. Sterling.

15 MR. MAC MAHON: Edward MacMahon on behalf of
16 Mr. Sterling, Your Honor.

17 MS. HAESSLY: Good morning. Mia Haessly on behalf of
18 Mr. Sterling, Your Honor.

19 THE COURT: Good morning. All right, counsel, have a
20 seat. We're going to hopefully do this very quickly.

21 The verdict form that was submitted by the
22 government, we've made -- the only change we've made to it is
23 we always want the foreperson's printed signature as well, so
24 that's been changed. Otherwise, that's exactly as it was left
25 with us. There's been no objection, so that's the one we're

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1 going to send to the jury.

2 In terms of the final charge, just so you know, we
3 did make two small typographical corrections since last night.
4 The instruction for Count 10, where it gives the elements, we
5 struck out the word "four" to "three," because there are only
6 three elements; and in the witness protection instruction,
7 there was a typo. I think "on" was "no." Whatever it was, it
8 was a one-letter typo, but it makes no change.

9 I looked at the government's request to change the
10 possession instruction. I'm not going to add the requested
11 changes. I think that's arguing your case.

12 The job of the instructions is simply to give
13 definitions of law to the jury but not necessarily to explain
14 how those definitions apply to the case. In my view, that
15 would overly help the jury making a decision one way or the
16 other.

17 So I'm not going to make the changes that the
18 government requested, and as far as I can tell, other than the
19 classification markings instruction we just got, there were no
20 other requests to change anything in the charge. Is that
21 correct?

22 MR. FITZPATRICK: That's right, Your Honor.

23 THE COURT: All right, that's fine, Mr. Fitzpatrick.

24 Now, the defense filed a series of objections. I
25 don't think those objections require any changes to the

1 instructions to the extent that both the instruction as to the
2 witnesses and the exhibits that have -- that we had to handle
3 specially clearly told the jury not to draw any inferences, and
4 therefore, the language is already there, and I don't think the
5 additional language is helpful, so I'm not going to add that.

6 In terms of the description of the counts, including
7 language about the Eastern District of Virginia, I told the
8 defense the choice you have is either a brief summary of what's
9 involved in those counts or the indictment goes to the jury,
10 and you-all are much happier with the indictment not going in.
11 Those counts do allege Eastern District of Virginia, and I
12 think it is therefore appropriate that that be in the overall
13 very brief summary of those counts, so I'm overruling that
14 objection.

15 And I didn't think there was any merit to any of the
16 others, but I'll hear any last-minute discussion of the
17 instructions.

18 The other thing I just want you to know so there's no
19 surprises, it's my standard practice when I give them the
20 direct and circumstantial evidence instruction to give them an
21 example, and it's usually it snowed in your front yard. You
22 see a footprint. You can draw an inference that there was
23 someone in your yard. Most of you have heard me do that one
24 before.

25 And with possession, I am leaving constructive

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1 possession in here because you have Mr. -- the allegation that
2 Mr. Risen got the possession from the defendant. I give the
3 jury, my standard example is actual possession, I've got
4 physical control of this pen. Constructive possession,
5 Ms. Guyton works for me, and therefore, I can tell her what to
6 do with her laptop computer, and therefore, I am considered in
7 the eyes of the law to have constructive possession of that
8 computer.

9 I'm not going to do joint and single. That we don't
10 need.

11 And those should be the only two slight ad libs.

12 All right, Mr. MacMahon?

13 MR. MAC MAHON: Yes, Your Honor, good morning. Just
14 briefly, with respect to the -- can I read from here, Your
15 Honor?

16 THE COURT: Yeah. I know you're uncomfortable, yeah.

17 MR. MAC MAHON: Judge, with respect to the venue
18 instruction, I understand the Court's ruling, but I did want to
19 put in the record -- I assume our objections are going to be
20 put in the record. Do you want us to file them ECF?

21 THE COURT: You should do them ECF so they're
22 formally on the record, yes.

23 MR. MAC MAHON: We will do that, Your Honor, and I'll
24 hand Mr. Trump a copy. We have one for you, Your Honor, but --

25 THE COURT: Oh, my law clerk can get it from you.

1 Ms. Copsey?

2 MR. MAC MAHON: Judge, I'm just handing you a page
3 from your opinion on the grand jury subpoena of Mr. Risen just
4 to put in the record here --

5 THE COURT: All right.

6 MR. MAC MAHON: -- as well.

7 What you wrote on page 24 of the opinion, which is
8 November 30, 2010, is -- and this, this is the substance of the
9 instruction that we asked for and it was refused -- is that
10 prosecutions involving disclosure of classified information,
11 venue is proper both where the information is sent and where it
12 is received.

13 And you talk about venue --

14 THE COURT: But read the next sentence: "Then you
15 may be in multiple districts as long as part of the criminal
16 act took place in that district," and I think that's not
17 inconsistent with my statement that as long as an act in
18 furtherance of the crime occurred in the district, there's
19 venue. So I --

20 MR. MAC MAHON: Well, I understand your ruling, Your
21 Honor, but I don't -- the defendant objects to the instruction.

22 THE COURT: I understand.

23 MR. MAC MAHON: It doesn't say the disclosure, that
24 venue is proper where it's sent or received. I'm just making
25 the record, Your Honor. Thank you.

1 THE COURT: That's fine, Mr. MacMahon. Anything
2 else?

3 MR. TRUMP: Yes.

4 THE COURT: And, Mr. MacMahon, the other objections
5 you had as to a definition of "causation" and "classified
6 information," the Court not only gives the elements of the
7 offense to a jury in jury instructions, but it's also expected
8 to give legal definitions of key terms within the elements, and
9 "national defense information" is a key term that does have to
10 be explained, and some of the -- as does "willfully,"
11 "knowingly."

12 I mean, some of these are English language words, but
13 in any standard charge, you still give the jury some specific
14 help. So to the extent that we've defined certain terms and
15 you've objected to that, I'm overruling that objection as well.

16 Now, Mr. Trump?

17 MR. TRUMP: Yes, Your Honor. On the possession
18 issue, and I don't believe there was any dispute from the
19 defense this morning, the definition, the fifth paragraph in
20 that instruction --

21 THE COURT: All right, give me the number of the
22 instruction.

23 MR. TRUMP: Possession defined.

24 THE COURT: Yeah. You've got page numbers. Just I
25 can get it faster. On the bottom of your -- go ahead. While

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1 you're talking, let me look for it. Go ahead.

2 MR. TRUMP: The way it reads is incorrect in terms of
3 Counts 1, 4, and 6. It should be in the past tense. In other
4 words, "In this case, lawful possession of classified
5 information means possession" --

6 (Knocking on Jury Room door.)

7 THE COURT: Wait, wait, wait, wait, wait.

8 MR. TRUMP: Page 31, Your Honor.

9 THE COURT: Thank you. Go ahead.

10 MR. TRUMP: "For Counts 1, 4, and 6, a person has
11 lawful possession of something if he is entitled to have it.
12 In this case, lawful possession of classified information means
13 possession of classified information by a person who held an
14 appropriate security clearance at the time the person acquired
15 the information."

16 THE COURT: Does the defense have any objection to
17 that?

18 MR. MAC MAHON: No, Your Honor, not to that part of
19 it. I mean, I've looked at it this morning. The part about
20 the memories and otherwise, I think, is argumentative, but, you
21 know, the issue in the case is there's no question Mr. Sterling
22 had a clearance when he obtained this information and that all
23 the events that took place thereafter, he didn't, he didn't
24 have a need to know, so I think that is a clarification that
25 would be good.

1 The rest of it, I don't think it's necessary.

2 THE COURT: All right, so let me go over that again.

3 "Possession of classified information by a person who held an
4 appropriate security clearance" --

5 MR. TRUMP: -- "at the time the person acquired the
6 classified information."

7 THE COURT: Wait a minute. Do we need "and had a
8 need to know"?

9 MR. TRUMP: "And had a need to know."

10 THE COURT: "At the time he acquired"?

11 MR. TRUMP: "At the time the person acquired the
12 classified information."

13 THE COURT: We will add that.

14 I did omit to tell the government, you-all, I am
15 striking the 404(b) instruction. It's not -- the defense
16 doesn't want it; the government doesn't need it. It's normally
17 done to protect the defendant, so I agree with you, I don't
18 think in this case it helps your case very much, all right?

19 MR. MAC MAHON: The instruction, Your Honor.

20 THE COURT: I'm getting rid of the instruction.

21 That's what you wanted, and I think that's correct.

22 MR. MAC MAHON: Well, the way it was written, Your
23 Honor, suggested it was evidence of other crimes.

24 THE COURT: Well, I tried to make it other acts. But
25 you don't want a 404(b) instruction; is that correct? If you

1 look at the book, if you look at O'Malley, it has acts and it
2 has crimes.

3 MR. MAC MAHON: Well, there's clearly going to be
4 argument about these letters and that they're not -- they
5 aren't part of the indictment, so I think the jury --

6 THE COURT: It's not the letters. It's the --

7 MR. MAC MAHON: It's the phone number, whatever --

8 THE COURT: It's the three documents that the
9 government maintained were still Secret when they were obtained
10 from your client's home, correct?

11 MR. MAC MAHON: Yes.

12 THE COURT: All right. Do you want an instruction on
13 that or not?

14 MR. MAC MAHON: Can I consult with Mr. Pollack, Your
15 Honor, briefly?

16 THE COURT: All right.

17 MR. MAC MAHON: Your Honor, the instruction goes to
18 other acts. I think the jury is going to wonder, especially in
19 the manner in which they saw those, what those documents would
20 be. The objection I filed last night was as to the -- there's
21 no, there's no 404(b) pattern type of evidence here that that
22 evidence would be, so it's hard to craft the instruction, I
23 understand.

24 THE COURT: Well, all right. That's why I omitted
25 the, the docket numbers. I could do it now. What I was going

1 to say and what it says now, "The government has introduced
2 evidence that defendant had classified documents," and I'm
3 going to do the exhibit numbers. I think it's 141 through --

4 MR. MAC MAHON: There's four of them.

5 THE COURT: 141, -42, -43. It's just those three.

6 MR. MAC MAHON: No, there were four, Your Honor.

7 There was also the, the report he had when he was a trainee.

8 MR. OLSHAN: Your Honor, there was four exhibits,
9 only three of which were introduced by the silent witness rule.

10 THE COURT: All right. Is that 145 then?

11 MR. OLSHAN: Correct.

12 THE COURT: All right. "In his custody when his
13 residence was searched." And that's correct, and that evidence
14 did come in.

15 MR. MAC MAHON: Yes.

16 THE COURT: And I changed the instruction slightly.
17 "Evidence that an act was done by the defendant at some time is
18 not, of course, evidence or proof whatever that at another time
19 the defendant performed a similar act, including the offenses
20 charged in the indictment."

21 MR. MAC MAHON: Yes. We would request that
22 instruction.

23 THE COURT: Well, that's what I gave you here.

24 MR. MAC MAHON: Well, I thought there was more to it
25 that --

1 THE COURT: Well, then it says, "Evidence of a
2 similar act may not be considered by the jury in determining
3 whether the defendant actually performed the physical acts."

4 MR. MAC MAHON: Mr. Pollack is asking that it be
5 "another act," because there isn't a similarity here between
6 the acts and the way the evidence came in, but I think the jury
7 does need to be instructed that it's just an act and how it
8 could be considered, because it was proffered just as evidence
9 of venue, and they don't need to be told -- I'm sure they'll be
10 told that in the argument, but --

11 THE COURT: All right, I believe I got the
12 word "other crimes" out, but I think I still left it in the
13 last paragraph, but, I mean, the way I modified the standard
14 404(b) instruction was to get out "evidence of other crimes"
15 and do it "evidence of other acts," all right? And that's
16 relevant only to the issue of intent.

17 Yeah.

18 MR. OLSHAN: Would the Court mind just reading the
19 portion of the instruction that the Court has as to what they
20 may consider it for?

21 THE COURT: Look at 24.

22 MR. OLSHAN: Page 24.

23 MR. MAC MAHON: Page 24, Your Honor?

24 THE COURT: Page 24 is where I've got it.

25 So the key -- I think the key paragraph, "If the jury

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1 should find a reasonable doubt from other evidence in the case
2 that the defendant did the act or acts alleged in the
3 particular count under consideration, the jury may then
4 consider evidence as to an alleged earlier act of a like nature
5 in determining the state of mind or intent with which the
6 defendant actually did the act or acts charged in the
7 particular count."

8 Now, that's verbatim from the standard jury
9 instruction.

10 MR. MAC MAHON: I think that's a model instruction,
11 isn't it, Your Honor?

12 THE COURT: It is a model instruction. I took out
13 the word "crime," so it's been modified, frankly, in your favor
14 in that respect. And then I have to take the word "crimes" out
15 of the last paragraph.

16 MR. MAC MAHON: They've already been told he's not on
17 trial for any other crimes.

18 THE COURT: Correct. And I've got it in the previous
19 instruction, on 23. So, I mean, it's been told twice.

20 MR. POLLACK: I'm sorry, Your Honor, in the first
21 paragraph, you're going to say that at another time, the
22 defendant performed another act, or is it going to say a
23 similar act?

24 THE COURT: It just says, "The government has
25 introduced evidence that defendant had classified documents,

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1 Exhibits 141 through 145" -- right? I'm going to add that.

2 MR. OLSHAN: 142 through 145.

3 THE COURT: 142 through 145.

4 MR. POLLACK: Yes.

5 THE COURT: ". . . in his custody when his residence
6 was searched. Evidence that an act was done by the defendant
7 at some other time is not, of course, any evidence or proof
8 whatever that at another time, the defendant performed a
9 similar act, including the offenses charged in the indictment."

10 That's absolutely, I mean, that's absolutely -- other
11 than I took the word "crimes" out as to the 404(b) evidence,
12 all right?

13 MR. POLLACK: Yeah. And I understand, Your Honor. I
14 just -- I would in that last line say "performed another act"
15 rather than "a similar act."

16 THE COURT: I'm not going to do that. I think I'm
17 sticking with the language. I've changed enough of it.

18 MR. MAC MAHON: Your Honor, can I talk to Mr. Trump
19 for one second about this instruction?

20 THE COURT: Go ahead.

21 MR. MAC MAHON: Your Honor, with respect to the
22 possession defined instruction?

23 THE COURT: Yes.

24 MR. MAC MAHON: In the government's revised draft on
25 the new paragraph 6?

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1 THE COURT: Go ahead.

2 MR. MAC MAHON: It says, "unauthorized possession of
3 classified information means possession of classified
4 information," and what was handed to me is a, is a statement,
5 namely, a letter related to Classified Program No. --

6 THE COURT: I don't have that. I did not agree to
7 put that request in this instruction.

8 MR. MAC MAHON: Okay. That's fine, Your Honor.

9 THE COURT: Okay?

10 MR. MAC MAHON: I didn't know that that had been -- I
11 think it may help the jury. So it can't be -- but that's fine;
12 I accept that.

13 THE COURT: Do you want --

14 MR. MAC MAHON: I mean, I would think that rather
15 than thinking that it was all the classified information that
16 may have been in his head or other things, that we're limited
17 to the letter about Classified Program No. 1, which is the
18 chart.

19 THE COURT: If you -- if both sides want that, I'll
20 be glad to enter it.

21 MR. TRUMP: For those counts, 2, 5, and 7, it's taken
22 directly from the indictment, namely, a letter related to
23 Classified Program No. 1.

24 MR. MAC MAHON: And I think that would eliminate the
25 potential for confusion of the jury as they try to decide what

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1 exact classified information.

2 THE COURT: All right, tell me which line in that you
3 want it. "In this case, unauthorized possession of classified
4 information means possession of classified information by a
5 person."

6 MR. MAC MAHON: After "classified information" is
7 comma, "namely, a letter related to Classified Program No. 1."

8 THE COURT: All right, I will add that.

9 MR. POLLACK: Your Honor, Mr. Trump said that applies
10 to Counts 2, 5, and 7. I think it also applies to Count 3.

11 THE COURT: Well, we're not talking about Count 3
12 here.

13 MR. POLLACK: I understand, but I think the same
14 should be on the Count 3 instruction. The national defense
15 information we're talking about in Count 3 is the letter.

16 THE COURT: All right, does the government agree with
17 that? What we could do is on page 41, where we're giving the
18 elements of Count 3, and the first element, "that on or about
19 the date set forth in the indictment" -- I thought we had put
20 the date in there because I want to help the jury not have to
21 search for those things -- "the defendant had unauthorized
22 possession or control over a document relating to the national
23 defense, specifically, a letter."

24 MR. POLLACK: Yeah, it looks like you already have
25 it, Your Honor, I'm sorry, on page 39.

1 MR. MAC MAHON: I'm sorry to be double-teaming you,
2 Your Honor. We're all trying to get this done. But on page
3 39, the nature of the offense on Count 3, says "namely, a
4 letter relating to Classified" --

5 THE COURT: So it's there. And the date --

6 MR. MAC MAHON: It's there, but it's not described as
7 an element of the offense.

8 THE COURT: Well, it's not really an element. It's
9 not an element. That's the, that's the item that fulfills that
10 element.

11 MR. MAC MAHON: Thank you, Your Honor.

12 THE COURT: So all right, it's there.

13 All right, is there anything else? Because we want
14 to get the jury --

15 MR. TRUMP: Yes, yes, Your Honor. The modification
16 to your 404(b) evidence does not take into account the other
17 permissible uses of 404(b). We did not offer it for proof of
18 intent. We offered it for proof of opportunity, intent,
19 preparation, plan, and knowledge. All of those should be in
20 the instruction.

21 THE COURT: What book are you looking at? Because
22 the one I took it --

23 MR. TRUMP: I'm looking at the rule, Your Honor.

24 THE COURT: I'm sorry?

25 MR. TRUMP: I'm looking at the rule, Rule 404(b). I

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1 mean, typically, 404(b) in many cases is offered for intent,
2 but that is not the purpose here.

3 THE COURT: I'm using the standard jury instruction,
4 which is not a misstatement of the law. And you can argue.
5 You can argue. I've ruled on that.

6 All right, anything else, Mr. Trump?

7 MR. TRUMP: No, Your Honor.

8 THE COURT: No? All right, are you all ready then
9 for the opening? Now, how do you want to split up your time?
10 45-15? 50-10?

11 MR. OLSHAN: Hopefully, closer to 50-10.

12 THE COURT: 50-10, all right. Everybody is ready.
13 We're going to try to go without a break, so that again, the
14 plan is after they've gotten closing arguments, we're breaking
15 for lunch. Then I'm going to instruct them, all right?

16 All right, let's bring the jury in.

17 (Jury present.)

18 THE COURT: Good morning, ladies and gentlemen.
19 Thank you. Please have a seat. And again, you've been on
20 time. We had a few matters we had to take care of.

21 I do want to ask you, did any of you look at *The*
22 *Washington Post* this morning before coming to court? No?
23 Either online or in the paper?

24 (No response.)

25 THE COURT: All right, because there was an article

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1 about the case. Again, you must be very careful to avoid any
2 exposure to anything about this case and avoid any kind of
3 outside-of-the-courtroom contact.

4 We're going to now go into closing arguments. As I
5 told you yesterday, we're going to hear first from the
6 government their closing argument, then the defense closing
7 argument, and because the burden of proof is on the government,
8 they'll get to do a brief rebuttal, and then you will have your
9 lunch break.

10 Obviously, that's going to be about two hours. If
11 any of you do need a break, you know, I'll be looking at you.
12 Just make a signal and we'll have to take a break.

13 We'll have the regular one-hour lunch break, but it's
14 earlier today, and then after lunch, you'll get the
15 instructions from the Court, and then you'll have the case to
16 deliberate.

17 Who's going to open for the government?

18 MR. OLSHAN: I am, Your Honor.

19 THE COURT: All right, Mr. Olshan, it's lovely to see
20 the sunshine, but if it's too bright, if it's bothering you, we
21 can close the blinds.

22 MR. OLSHAN: I think the sunshine is good, Your
23 Honor.

24 THE COURT: All right, that's fine.

25

1 CLOSING ARGUMENT

2 BY MR. OLSHAN:

3 One of the most important priorities of the United
4 States government is to do everything it possibly can to
5 prevent a foreign enemy from obtaining a nuclear weapon.
6 Keeping nuclear weapons out of the hands of countries like Iran
7 protects the United States, and it protects the American
8 public. Make no mistake; we don't have that many options. The
9 classified program at issue in this case was one of those
10 options.

11 When the CIA developed Classified Program No. 1, they
12 vetted it, they approved it, they put time and resources into
13 it so that this country had an option, an option to disrupt the
14 nuclear weapons capabilities of Iran. It was one of the only
15 levers that we believed that we had to try to disrupt the
16 Iranian nuclear weapons program.

17 Those were the words of former National Security
18 Advisor and Secretary of State Condoleezza Rice. She was one
19 of a parade of witnesses who came into this courtroom and sat
20 in that witness box and told you how important, how vitally
21 important this classified program was. Not just that we would
22 develop a classified program that could help undermine the
23 Iranian nuclear program, but the fact that that program was a
24 secret.

25 Without question, the operation at the heart of this

1 case was one of the CIA's and the United States' most sensitive
2 and closely held programs. Public disclosure of that program
3 and Merlin, the human asset at the heart of it, risked grave
4 harm not only to Mr. Merlin and his family but also to the
5 United States and its ability to keep programs like this one a
6 secret.

7 So why are we here talking about it in a courtroom?
8 Because of that man, the defendant, Jeffrey Sterling, someone
9 who violated the oath he swore on the first day he became an
10 employee of the CIA in 1993, an oath to safeguard the CIA's
11 secrets not just while he was employed at the CIA but forever.
12 That was his oath, and he broke it.

13 In 2002, on his last day as an employee at the CIA,
14 what did he do? He refused to sign that last form saying he
15 understood his obligations and he would abide by them. The
16 same promise that he made on his way into the agency, the
17 defendant refused to make on the way out.

18 You see, the defendant's career was in shambles by
19 that point, and he blamed the CIA. He felt he'd been
20 mistreated by the agency, he was angry, and he was bitter, and
21 so he was done keeping the CIA's secrets.

22 Four years later, many of the secrets that had been
23 entrusted to the defendant during his time at the CIA came
24 spilling out of chapter 9 of James Risen's book, *State of War*.
25 Risen and Sterling had developed a relationship during

1 Sterling's discrimination lawsuit, and Risen was a natural
2 conduit for Mr. Sterling's story, and so out came the details
3 of Sterling's work on a classified program and with a
4 classified human asset, that's Merlin, the defendant knew very
5 well. That's why you're here, ladies and gentlemen.

6 Over the course of this trial, you've heard testimony
7 and seen documents that establish a simple truth: Jeffrey
8 Sterling, a disgruntled former CIA employee with an axe to
9 grind, disclosed the CIA's secrets to Risen, a reporter he knew
10 well.

11 But let's step back. This case comes down to three
12 basic questions:

13 1: Who knew all of the information about Classified
14 Program No. 1 that shows up in chapter 9 of *State of War*?

15 Question 2: Who had a motive to disclose that
16 information?

17 Question 3: Who had a relationship with James Risen?

18 The evidence in this case has proven beyond a
19 reasonable doubt that the single answer to all three of those
20 questions is just one person: the defendant, Jeffrey Sterling.
21 Not only did the defendant know all of the relevant facts about
22 Classified Program No. 1 that showed up in Risen's book; he was
23 an eyewitness to many of them.

24 More importantly, Mr. Sterling, unlike anyone else
25 who knew anything about this operation at any point, was the

1 only person who had a reason to tell Mr. Risen what he knew
2 about it. By the time Mr. Risen picked up the phone to call
3 Bill Harlow at the CIA in April of 2003 with Mr. Risen's story
4 about this botched Iranian nuclear operation, Mr. Sterling had
5 run out of options. He'd lost his EEO complaint, and his civil
6 lawsuit was going nowhere. The agency had rejected not one,
7 not two, but five settlement offers from Mr. Sterling and his
8 lawyers.

9 The defendant was unemployed, he was angry, and he
10 was bitter. He wanted to lash out. There's your motive.

11 And finally, he knew how to lash out. He already had
12 a documented relationship with Risen. Just five weeks after
13 Mr. Sterling refused to sign that final nondisclosure
14 agreement, Mr. Risen published a story about the defendant in
15 *The New York Times*. So the next year, in 2003, Mr. Sterling
16 knew who would listen to him. Three questions, one common
17 answer: Jeffrey Sterling.

18 Let's take each question one at a time. Question 1:
19 Who knew all the information in chapter 9? When you go back to
20 the jury room, you're going to get a couple binders filled with
21 all of the exhibits in this case. Before you take a look at
22 any of those nondisclosure agreements or any of the cables we
23 looked at for a number of days or any of those settlement
24 offers that were rejected by the CIA, pull out Exhibit 132.
25 That's chapter 9.

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1 As you go through chapter 9, remember one thing: All
2 that matters for purposes of this case and your job as jurors
3 is information in that chapter about Classified Program No. 1
4 and Merlin. Everything else in that chapter you can ignore.
5 Cross it out. It's irrelevant.

6 The publication of that chapter exposed to the world,
7 friends and enemies alike, the details of Classified Program
8 No. 1, so let's start with it. As you read it, you'll notice
9 that much of the chapter has nothing to do with Classified
10 Program No. 1 or Merlin. All that's left when you take that
11 out is what matters.

12 Ladies and gentlemen, at its core, chapter 9 contains
13 accurate classified details about Classified Program No. 1 and
14 Merlin. Let's start with what Risen gets right: The core true
15 corroborated facts. I'll highlight a few.

16 The book accurately describes that Classified Program
17 No. 1 was designed to stunt the development of Tehran's nuclear
18 program by sending Iran's nuclear experts down the wrong
19 technical path, wasting years trying to make a flawed nuclear
20 design work instead of focusing on their existing nuclear
21 program. That's the basic overview of the program, and it's
22 true.

23 More specifically, the chapter details the nature of
24 the flawed plans, identifying the specific nuclear component as
25 a TBA 480 high-voltage block or firing set for a

1 Russian-designed nuclear weapon. That specific detail, that's
2 true.

3 The book also accurately sources the original Russian
4 intelligence to a Russian scientist who's working with the CIA.
5 You've seen him referred to in cables as Human Asset No. 2.
6 The book notes that the intelligence from Human Asset No. 2 was
7 sent to a National Laboratory and scrutinized by a team of
8 scientists. All of that is true. The same team was asked to
9 implant flaws deliberately into those Russian -- into that
10 Russian design, and those flaws were supposed to be so clever
11 and well hidden that no one would be able to detect their
12 presence.

13 Again, it's in the book, and it's true. Walt C.
14 testified about exactly how the National Laboratory went about
15 taking that intelligence from Human Asset No. 2, creating that
16 working fire set, deconstructing it to add in those embedded
17 flaws, and testing it with a Red Team. That's true.

18 Now, in addition to specific technical details of the
19 operation, chapter 9 also contains several facts about Merlin,
20 also known as Human Asset No. 1. For example, the book
21 accurately reflects that Merlin was a Russian scientist who had
22 worked at Arzamas-16 in the former Soviet Union and who had
23 endured long debriefings in which CIA experts and scientists
24 from the National Laboratories tried to drain him of everything
25 he knew about the status of Russia's nuclear weapons program.

1 Those details about Merlin are true. And when he
2 testified, he told you that the description of him in the book
3 was enough for the Russians to figure out who he was and the
4 fact that he was working with the United States government.

5 As for Merlin's role in Classified Program No. 1, the
6 book once again gets many things right. For example, as part
7 of the operation, Merlin's job was to pose as an unemployed and
8 greedy scientist who would serve as a go-between for the other
9 Russian scientist, the one with the greater technical know-how.
10 That's true.

11 In order to develop viable Iranian contacts, the CIA
12 instructed Merlin to send e-mails to Iranian scientists and
13 scholars and to attend scientific conferences. That's true.
14 Those were his instructions.

15 Ultimately, Merlin communicated with an Iranian
16 professor, and later, when the CIA learned that another
17 Iranian, this one a top official, was headed to the
18 International Atomic Energy Association, or IAEA, in Vienna,
19 the decision was made to send Merlin over with the fire set
20 plans. All true and all in the book.

21 So Merlin traveled at the CIA's direction to Vienna
22 in February of 2000 to make the delivery. During his trip,
23 Merlin saw a postman while he was trying to figure out how to
24 deliver the plans. Ultimately, he found the mission and
25 delivered them.

1 Ladies and gentlemen, these facts are true, and
2 they're all in chapter 9. There's also no dispute that all of
3 the facts that I've just recited to you were facts known to the
4 defendant, but that's not all.

5 The chapter also contains a number of additional
6 details that point to Mr. Sterling specifically as the source
7 for Risen. First, as you read chapter 9, pay attention to who
8 gets the most favorable treatment of all the people who are
9 referenced in that chapter. It's not Merlin. No, Merlin's
10 portrayed as being a handling problem, a bumbler, somebody
11 who's out for money.

12 And it's not Robert S. No, he was more concerned
13 about pushing ahead than listening to the concerns raised by
14 the case officer or Merlin as portrayed in the book.

15 And it's certainly not the CIA managers, who somehow
16 deem this mission a success despite those risks portrayed in
17 the book.

18 No, the only person who comes out smelling like roses
19 in Mr. Risen's telling is Mr. Sterling, the case officer. Who
20 was the case officer during the operation? Jeffrey Sterling.
21 The book even mentions the fact that the case officer took his
22 concerns to the Senate. You know that's also true. The way
23 Mr. Risen writes it, the defendant, the case officer, is the
24 hero of chapter 9.

25 You should also pay attention to the two most

1 detailed events related to Classified Program No. 1 that show
2 up in the book. Both took place during the defendant's time as
3 Merlin's case officer: the meeting in San Francisco and the
4 trip to Vienna. Those events bookended the defendant's time as
5 Merlin's case officer: trip to San Francisco, trip to Vienna.
6 No other case officer had greater knowledge of those events
7 than the defendant.

8 First the San Francisco meeting. Chapter 9
9 accurately reflects that Merlin was first shown the fire set
10 design in a hotel room during the trip. It also mentions that
11 the case officer, that's Sterling, and the senior CIA officer,
12 that's Robert S., had a private conversation after Merlin
13 raised initial concerns about the completeness of the plans.

14 That private meeting is reflected in no cable
15 traffic. You have the cables. You won't see any single
16 reference to that private conversation between Robert S. and
17 the defendant.

18 And what about the trip to Sonoma? You remember
19 that. That happened. You heard it from Mr. S. He told you
20 about the kinds of wines he liked.

21 The only people who went on the trip were Mr. and
22 Mrs. Merlin, the defendant, and Robert S. Once again, no
23 mention of Sonoma in any cable traffic.

24 What about the other bookend to Sterling's time as
25 Merlin's handler, the Vienna trip? Much of chapter 9 deals

1 with Merlin's attempt to deliver the flawed plans to the
2 Iranian mission, to the IAEA. Once again, the book contains a
3 true detail that appears in no official CIA document and would
4 have been known only to Merlin and the people who debriefed him
5 when he got back, Sterling and Robert S. That detail was the
6 postman Merlin saw when he was attempting to deliver the plans.

7 Next we have the letter. In chapter 9, Risen
8 reproduces verbatim the letter Merlin purportedly gave to the
9 Iranians when he delivered the plans. This is the letter that
10 laid out for the Iranians what Merlin was giving them and the
11 fact that Merlin expected to be paid if they wanted any more.

12 With one minor exception, the version of the letter
13 that appears in the book is an exact duplicate of the last
14 version of the letter to appear in any CIA cable. You have a
15 draft letter. It's embedded in the cable that's at Government
16 Exhibit 35. That was a cable drafted by the defendant on
17 January 12, 2000.

18 Two days later, you have edits coming back from
19 headquarters from Robert S. He recommends changing the letter
20 to reflect that it's clear to the Iranians that this initial
21 package is for free. That's in Government's Exhibit 36.

22 What appears in the book is the draft letter from
23 Exhibit 35 with the changes made that show up in Exhibit 36.
24 The evidence at this trial established that the people who
25 worked most closely on back-and-forth edits to those letters

1 over a period of months were Mr. Sterling and Merlin.

2 And during, during Merlin's testimony, when
3 Mr. MacMahon asked him about the last version of the letter,
4 what did Merlin say? He said a couple weeks before he left for
5 Vienna, he took the last version and he gave it to Jeff, the
6 defendant.

7 Finally, take a look at page 197 when you go back in
8 the jury room of chapter 9. At the very top, in paragraph 20,
9 there is a reference to a secret CIA report that referred to
10 Merlin as a known handling problem due to his demanding and
11 overbearing nature, and according to the book, he was a
12 sensitive asset who had been used in a "high-priority
13 operation."

14 Again, that's true, but what's even more interesting
15 about this language is the source of it. This language appears
16 verbatim in the defendant's performance assessment report, or
17 PAR, from 2000, the same exact language.

18 And you know the defendant was given a copy of his
19 PAR with that quoted language in the course of his EEO
20 litigation, but keep one other thing in mind: Nothing in the
21 performance evaluation connects that quoted language to a
22 specific classified program or specific asset. It's vague.

23 The only way James Risen knew to take that language
24 and connect it to this operation and this asset was if someone
25 told him that that language connected to the asset in the

1 program.

2 Bottom line, not only does chapter 9 contain a number
3 of core facts related to Classified Program No. 1 and Merlin;
4 all of them were known to the defendant. That's question 1.

5 What about question 2? Who had motive? Who had any
6 motive to disclose any information about Merlin and Classified
7 Program No. 1? This is an easy question, ladies and gentlemen.
8 The only person who had any reason to do this was the
9 defendant. There is absolutely no, zero evidence that anyone
10 else had any motive to disclose these facts about this
11 operation and Merlin. Just the defendant.

12 How do you know? Look at the particular spin that
13 Mr. Risen puts on the operation in the book. He took those
14 core true facts and he spun them in a particular way. That's
15 the claim that this was somehow a botched operation that risked
16 handing over the keys to the nuclear kingdom to Iran.

17 Who had reason to spin a story in a way that made the
18 CIA look hapless and reckless? It's not Mr. Merlin or Robert
19 S. They both testified they thought the operation was
20 brilliant. No.

21 Who had a reason not only to out the program but to
22 do it in a way that would inflict maximum damage to the CIA?
23 Jeffrey Sterling. Jeffrey Sterling's spin is what appears in
24 the book. It's the exact story he told Don Stone and Vicki
25 Divoll when he went to the Senate Intelligence Committee on

1 March 5, 2003, less than a month after the CIA had rejected his
2 fifth settlement offer.

3 The only other time anyone expressed the concerns
4 that Risen parroted in his book was when Mr. Sterling went to
5 the Senate. That meeting took place over three years, three
6 years since the trip to Vienna, when Merlin handed over the
7 plans.

8 Take a look at the cables. At no point leading up to
9 the trip, over a year, from December of 1998 to when the trip
10 occurred in February of 2000, at no point during that time did
11 the defendant raise a single concern about this operation, not
12 a word to Robert S., not a word to his chain of command in New
13 York -- that's Mark L., Tom H., Charles Seidel, David Cohen --
14 not a word.

15 This is very serious stuff we're talking about,
16 ladies and gentlemen. This is nuclear weapons technology. If
17 the case officer who was assigned to oversee this operation had
18 concerns, why wouldn't he raise them before these plans made
19 their way overseas? He'd be crazy not to.

20 The defendant didn't speak up because he didn't have
21 any concerns. Not a word when he went to the CIA Inspector
22 General to complain about discrimination in December 1999.
23 That was before the operation occurred into 2000.

24 And when Sterling went to the House Intelligence
25 Committee, you'll remember that's HPSCI, in August of 2000,

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1 again, not a single word about a botched operation. Michael
2 Sheehy testified that a program -- that this program was
3 extremely sensitive. He was reluctant to talk about it in
4 court this week, 15 years later. Not a word to Mr. Sheehy.

5 No, Sterling didn't raise any concerns until March
6 2003, almost five years, five years since the first meeting in
7 San Francisco where Merlin was shown the plans.

8 What happened between August 2000, when he went to
9 the House, and March 2003, when the defendant went to the
10 Senate? About three years of bitter litigation involving
11 Sterling and the CIA.

12 First there was the EEO process. It took more than a
13 year. Sterling lost. Then the civil litigation, not one but
14 ultimately two lawsuits. You have the exhibits. The defendant
15 lost. And all the while, the CIA rejected every one of the
16 defendant's settlement offers. The CIA wasn't giving in.

17 During that time in August 2000, Sterling told Eileen
18 Swicker, she's the chief of staff to the Deputy Director of
19 Operations, that he would, quote, pursue his claims as long and
20 as loud as possible, inside and outside the agency.

21 Later in January 2003, when the defendant was
22 fighting with the Publications Review Board over the
23 publication of his memoir, he told Bruce Wells that he was,
24 quote, absolutely disgusted with the CIA and that the board's
25 conduct was, quote, absolutely reprehensible. He told Wells

1 he'd be coming at the CIA with, quote, everything at his
2 disposal.

3 Now, I want to talk to you very directly about the
4 defendant's claims against the CIA. Discrimination is a
5 serious matter. There is no place for it in the workplace,
6 whether it's government or private sector. No one here is
7 going to say otherwise.

8 But regardless of the merits of Mr. Sterling's claims
9 against the CIA, one thing was abundantly clear: Mr. Sterling
10 was very unhappy with the CIA. Everyone agrees Mr. Sterling
11 was angry at the CIA. That's what matters in this case.

12 That is what gave Mr. Sterling the motive to take the
13 secrets entrusted to him by the CIA, valuable secrets that the
14 CIA had spent years investing in, and put a spin on them, the
15 spin that he took to the Senate, the same one that showed up
16 later in chapter 9, where the defendant is the hero.

17 What about some of the other people we've heard about
18 in this trial? What about their motives? Let's start with
19 Robert S. At least two things came across clearly in his
20 testimony: One, this program was his baby, and he was very
21 proud of it; and two, he had absolutely no reason to talk to
22 Sterling -- excuse me, Risen.

23 This was a program that Mr. S. invested ten years of
24 his career developing. What reason did he have to talk to
25 Risen, let alone to tell him that his brainchild was somehow

1 botched? No reason.

2 And if Mr. S. had spoken to Mr. Risen, you'd expect
3 there would be some additional details in the book, things that
4 Mr. S. knew that the defendant didn't know. But conveniently
5 in the book, the timeline lines up with the defendant's
6 involvement in the program. Mr. S. was there from start to
7 finish, but the book only covered the defendant's time.

8 How about Ms. Divoll from the Senate? She only knew
9 the barest sketch of the details contained in chapter 9. She
10 told you that. So did Don Stone. There was a memo written at
11 the time in April of 2003.

12 Don Stone and Vicki Divoll didn't hear that this was
13 a TBA 480 fire set. They didn't hear that there was a meeting
14 in San Francisco. They didn't hear about the postman. They
15 didn't hear that these plans were delivered to Vienna. They
16 didn't hear about Merlin's compensation or whether he was a
17 handling problem. None of their performance evaluations show
18 up in chapter 9. They just didn't know.

19 And what motive did Ms. Divoll have to call Risen and
20 talk about this program? None.

21 And finally, you've heard the defense actually
22 suggest, actually suggest that Merlin may have been a source
23 for Risen. Ladies and gentlemen, when you come through those
24 doors and into this courtroom or that door into this courtroom,
25 you don't check your common sense when you enter. There is no

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1 reason in this world why Merlin would put his own life at risk,
2 the life of his wife and his family, by talking to Mr. Risen
3 about what he did while working for the CIA. He didn't even
4 tell his wife what he was doing. She told you that.

5 When the defense asked Mrs. Merlin when she was
6 testifying if they had actually been contacted by the KGB yet,
7 she said, "No, not yet." These people live in abject fear,
8 day-to-day, that the people from their former country are going
9 to come get them. What reason would Merlin have to talk to
10 James Risen? None.

11 What makes most sense, the commonsense answer is that
12 the only person with motive was the defendant. That's question
13 2.

14 Question 3, who had a relationship with James Risen?
15 Again, the evidence in this case has established that only one
16 person had a relationship to James Risen: Jeffrey Sterling.
17 Go back to that first article after 9/11. It's Government's
18 Exhibit 75. On November 4, 2001, Mr. Risen wrote an article
19 citing unnamed sources for the fact that a CIA office had been
20 destroyed on 9/11. That was five days after Jeffrey Sterling
21 lost his appeal and was terminated from the CIA, five days, and
22 then that story ran. A couple of months later, the defendant
23 was gloating about it when he spoke to Carrie Newton Lyons
24 about how he had disclosed that fact to a newspaper.

25 And then there was this article, ladies and

1 gentlemen. This is Government's Exhibit 83. It ran on
2 March 2, 2002, about a month after the defendant refused to
3 sign his final secrecy agreement. The byline is James Risen.
4 The subject? The only subject of this article is Jeffrey
5 Sterling. That's his picture. Jeffrey Sterling and his fight
6 against the CIA. 1,630 words, ladies and gentlemen, that James
7 Risen wrote about Jeffrey Sterling in *The New York Times*.

8 There is simply no better proof of an existing
9 relationship between Jeffrey Sterling and James Risen than that
10 article. Not only does Risen quote extensively from Sterling;
11 he also quotes from another one of his PARs, the 1990 -- excuse
12 me, the 1999 PAR that Sterling got during the EEO process.
13 That's Exhibit 59.

14 Specifically, the article states that Sterling had
15 received a positive performance evaluation which stated that
16 he, quote, demonstrated good tradecraft in the handling of his
17 assigned cases.

18 So you've got the 1999 PAR quoted in this article and
19 the 2000 PAR quoted in chapter 9, both documents that Sterling
20 had, both quoted in Risen's work.

21 But that wasn't the end of the relationship, not by
22 any stretch. Take a look at Government's Exhibit 98. It's a
23 summary of calls and e-mails between the defendant and James
24 Risen. Special Agent Hunt took you through it yesterday.

25 The first call, first documented call is on

1 February 27, 2003. That was about two weeks after
2 Mr. Sterling's final settlement offer lapsed and about a week
3 before he showed up at the Senate.

4 Exhibit 98 shows a pattern of calls beginning in
5 February 2003 and ending in November 2005, about a month before
6 *State of War* was published. February 2003 to November 2005.
7 During that time, Risen's contact with the defendant continued
8 even when the defendant moved.

9 In February and March of 2003, the calls were from
10 the defendant's home in Herndon, right here in the Eastern
11 District of Virginia.

12 The next year, after Mr. Sterling had moved in with
13 his friends, the Dawsons, in Missouri, the phone traffic
14 continued, and after he moved out of the Dawsons' house later
15 in 2004, Sterling continued to communicate by phone with Risen
16 from the defendant's work phones.

17 In total, 47 calls, some very short, some longer, but
18 47 times these individuals called each other. These calls
19 began before Sterling went to the Senate. They continued
20 through Mr. Risen's calls to Bill Harlow about his *New York*
21 *Times* article that he was planning to write. They continued
22 through the time when the article was squashed and through
23 finally the lead-up to *State of War*'s publication.

24 And then there were the e-mails. First let's look at
25 the e-mail from March 10, 2003. This was the e-mail that was

1 deleted from Mr. Sterling's e-mail account. It was deleted
2 sometime three years later, around when he learned the FBI was
3 investigating. It says: "I'm sure you've already seen this,
4 but quite interesting, don't you think? All the more reason to
5 wonder...J."

6 This is an e-mail from Mr. Sterling to James Risen.
7 And what's the link that's included in this e-mail? It's an
8 article, a CNN article titled, "Report: Iran Has 'Extremely
9 Advanced' Nuclear Program."

10 The defendant sent this e-mail just five days, five
11 days after he went to the Senate with his story, his story
12 about how the classified program may have actually aided the
13 Iranians. And wouldn't you know, five days later, he's
14 e-mailing an article about Iran and its nuclear weapons program
15 to James Risen.

16 This isn't an e-mail about race discrimination or his
17 complaints against the CIA. This is about Mr. Sterling and his
18 work and whether the Iranian nuclear program has been advanced.
19 It says, "All the more reason to wonder."

20 What does Mr. Sterling want Risen to wonder about
21 when he's sending him that? It's that story that he told the
22 Senate, whether they had actually aided the Iranian nuclear
23 weapons program.

24 It fits, ladies and gentlemen. It fits the
25 defendant's spin, the one he gave the Senate and the one he

1 gave Risen.

2 That wasn't it for e-mails, though. There were the
3 deleted e-mails Special Agent Hunt was able to recover from the
4 Dawsons' computer. Let's take a look at a few.

5 December 23, 2003, after the defendant had left
6 Virginia, Risen to Sterling: "Can we get together in early
7 January?"

8 May 8, 2004, Risen to Sterling: "I want to call
9 today. I'm trying to write the story. Jim." And, "I need
10 your phone number again."

11 May 16, 2004, Risen to Sterling: "I am sorry if I
12 have failed you so far. But I really enjoy talking with you,
13 and I would like to continue. Jim."

14 Finally, June 10, 2004: "I can get it to you. Where
15 can I send it?"

16 A few months after that last e-mail, Risen submitted
17 a book proposal to Simon & Schuster. That's Government's
18 Exhibit 128. That document contains Merlin's true first name,
19 not his code name. His true first name.

20 Ladies and gentlemen, this evidence -- the 9/11
21 article, the *New York Times* profile of the defendant, and the
22 e-mail and phone traffic -- all make clear that not only did
23 the defendant and Risen have a relationship; they maintained
24 that relationship all the way through publication of *State of
25 War*.

1 After the book came out in January of 2006, how many
2 more calls did you see? How many more calls was Special Agent
3 Hunt able to identify until sometime in the middle of 2007,
4 when the request had ended?

5 Zero calls. No more calls between Mr. Sterling and
6 Risen after the book came out.

7 The job was done, ladies and gentlemen. Mr. Risen
8 wrote the story; it got published.

9 Three questions; three common answers. Who knew all
10 the true details in chapter 9? The defendant. Who had a
11 motive to disclose those facts and paint them in a false light?
12 The defendant. And who had someone in the media who would
13 listen to him? The defendant.

14 One other thing: After lunch, the Court will
15 instruct you that the government only has to prove that the
16 defendant was a source for Risen; that's all. So long as you
17 conclude that Sterling was a source, one source, it's
18 completely irrelevant whether he had any other -- whether
19 Mr. Risen had any other sources for the same or different
20 information related to this program or Merlin. Keep that in
21 mind as you review the evidence.

22 There are nine charges in this case. After the
23 lawyers finish up, as I mentioned, the judge will instruct you
24 on the law that you should apply to the facts. Listen
25 carefully to those instructions. I'm not going to repeat all

1 of them here, but let me break them down very briefly.

2 Six of the counts, Counts 1 and 2, 4 and 5 and 6 and
3 7, address the defendant's unauthorized disclosure or
4 communication of material related to Classified Program No. 1
5 and Human Asset No. 1, or Merlin. Counts 1 and 2 charge the
6 defendant with causing, causing the unauthorized communication
7 of what's called national defense information to the general
8 public via publication of *State of War* in 2006.

9 Counts 4 and 5 charge the defendant with the
10 unauthorized communication of national defense information to
11 James Risen in 2003, and Counts 6 and 7 charge the defendant
12 with attempting to cause the unauthorized communication of
13 national defense information to the general public through that
14 *New York Times* article that Mr. Risen wanted to write and was
15 about to publish until the meeting with Condoleezza Rice.

16 These charges are grouped in pairs, one count
17 focusing on the disclosure of information and the other count
18 focusing on the disclosure of a tangible item, the letter to
19 the Iranians that Risen reproduced in chapter 9.

20 That's six of the charges. So what do you need to
21 decide as to each? First, did the defendant have possession of
22 the relevant information or letter relating to the national
23 defense?

24 Again, there is no dispute that all of the true
25 details about Classified Program No. 1 and Merlin that show up

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1 in Risen's book were known to Mr. Sterling. They are the same
2 details that Risen told Bill Harlow he was prepared to put in a
3 *New York Times* article in 2003.

4 You also know that Sterling had access to the letter
5 that shows up in chapter 9. Merlin testified that he gave the
6 defendant a copy. Risen told the CIA in 2003 he had seen a
7 letter.

8 I want you to remember a distinction between
9 information generally and the physical document, the letter.
10 The defendant is not charged with unlawfully possessing the
11 information that came into his head when he was an employee at
12 the CIA. When you leave the job, you can't purge that from
13 your mind. He can lawfully possess that information forever.
14 The problem is if you take that information and you disclose
15 it.

16 The same is not true for the document. Once
17 Mr. Sterling no longer had a need to know about Classified
18 Program No. 1, his continued connection or retention of that
19 document was unlawful. That possession was unlawful. He was
20 not allowed to have it. In fact, Gayle Scherlis told you that
21 when he was leaving the CIA, she instructed him that he was
22 obliged to return any classified information that he had, and
23 he did not.

24 Once you determine that the information or letter was
25 in the defendant's possession, you must also determine whether

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1 the material related to the national defense. The judge will
2 tell you that something relates to the national defense, it's a
3 term of art, if it is closely held by the government and could
4 be damaging to the United States or used for the benefit of an
5 enemy of the United States.

6 Once again, the evidence establishes that the
7 information and document in question without question relate to
8 the national defense. You heard witness after witness describe
9 how closely held this program was. Secretary Rice told you
10 this was one of the most closely held programs during her
11 entire tenure as National Security Advisor. David Cohen, the
12 boss of the New York office, told you this was one of the most
13 closely held programs during his entire 35-year career with the
14 CIA. David Shedd said the same thing.

15 Even the scientist, Walt C., who testified on one of
16 the first days of trial, he told that you in over 40 years of
17 experience between his work with the Air Force and his work at
18 the National Laboratory, this program was the most closely held
19 operation he'd every worked on.

20 You also heard multiple witnesses discuss just how
21 damaging that sort of disclosure could be. Secretary Rice
22 commented on how few options the United States had to undermine
23 the Iranian nuclear program. Robert S. and Charles Seidel
24 talked about how devastating it can be to the United States'
25 national security interests when a program like this is

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1 exposed. Not only does it tell our foreign adversaries that we
2 are targeting them; it tells them how we're doing it.

3 Disclosure of this sort of information has the
4 potential to do real damage to our relationships abroad. If
5 this country cannot keep its secrets, why would any other
6 country share theirs with us? And if we cannot protect our
7 human assets, why would anybody willingly become one?

8 Next, you must determine whether the defendant had a,
9 quote, reason to believe disclosure could cause potential harm
10 to the United States or aid a foreign nation. This is easy,
11 ladies and gentlemen. Mr. Sterling was a trained case officer.
12 He knew the implications of disclosing this information.

13 Finally, you have to determine that the defendant
14 willfully or with an unlawful purpose communicated the
15 information or caused another person to communicate it to
16 someone who did not have a right to receive it. You've seen
17 the defendant's secrecy agreement. He knew it was a crime to
18 disclose classified information to anyone without appropriate
19 clearances, anyone, let alone James Risen.

20 And how do you know he wanted to go one step further
21 and cause Mr. Risen to communicate these same facts to the
22 public at large? Because that's what reporters do, ladies and
23 gentlemen. You talk to a reporter because you want them to
24 tell your story. You don't go talk to a reporter because
25 you're hoping that they'll keep all of your secrets. There's

1 no other reason to talk to a reporter.

2 Sterling did for years -- 47 calls, multiple
3 e-mails -- because he knew Risen would be his mouthpiece and
4 broadcast his version of events to the world, and that's what
5 he did. That's how you know he willfully caused Risen to
6 communicate those facts to the public.

7 Ladies and gentlemen, as to Counts 1 and 2, there's
8 no dispute that *State of War* was sold in the Eastern District
9 of Virginia, none. Those facts were communicated to people
10 here in the Eastern District of Virginia, everyday folks,
11 enemies and friends alike, who had no right to access that
12 information.

13 There's also no dispute that the defendant was
14 unemployed and living in Herndon, in the Eastern District of
15 Virginia in earlier 2003, when Risen first picked up the phone
16 and called Bill Harlow to tell him the details of his story
17 about Classified Program No. 1 and Merlin. There is no dispute
18 Sterling called Risen from his home in February 2003, and
19 there's no dispute that Sterling e-mailed Risen the CNN article
20 while Mr. Sterling was living in Herndon.

21 There's also no dispute that Mr. Sterling was in
22 possession of classified CIA documents when his house in
23 Missouri was searched in 2006. Four-and-a-half years after he
24 had any access to CIA facilities, where did Mr. Sterling keep
25 CIA documents? At his home. He had moved two times, and yet

1 there they were at his home. This is a man who keeps CIA
2 documents at his home.

3 Again, when he left the CIA, he was living in
4 Herndon, right here in the Eastern District of Virginia, during
5 the same time Risen was preparing the *New York Times* story that
6 Condoleezza Rice ultimately convinced the paper not to run.
7 That's six of the counts. That leaves three additional counts.

8 Count 3 is similar to the first six I told you about.
9 It has to deal with the defendant's unlawful retention of that
10 letter. Again, Merlin told you he gave the defendant the
11 letter. Where did the defendant keep CIA documents? At his
12 home. Where was the first place he moved when he left the CIA?
13 Right here, Herndon.

14 Count 9 charges the defendant with causing Risen to
15 convey the CIA's property to the general public. What was the
16 property? It was those secrets about Classified Program No. 1
17 and Merlin.

18 The judge is going to instruct you that property can
19 be something intangible, it can be secrets, and what's more
20 valuable to the CIA than its secrets? The CIA put ten years
21 into this classified program. Between case officers, people
22 like Robert S. in the Counterproliferation Division, and all
23 the people who worked on planning and implementing the program,
24 that's thousands and thousands of man-hours.

25 What about the lab? The lab spent the better part of

1 two years and over a million-and-a-half dollars developing the
2 fire set plans.

3 In order to establish the defendant's guilt as to
4 Count 9 and whether he caused the conveyance of these -- this
5 property in the Eastern District of Virginia, you must
6 determine that the value of that information was \$1,000; that's
7 all. There's no doubt that it far exceeded that amount.

8 And finally, Count 1, obstruction of justice, this
9 count focuses on the deletion of the March 10, 2003 e-mail.
10 You heard about it already. The defendant got a snapshot at
11 three different times. They got the April 2006 snapshot,
12 before the defendant knew any idea that there was an FBI
13 investigation, that there was a grand jury investigation.
14 After he received that, there were two more snapshots in July
15 and October of 2006.

16 This e-mail, Government's Exhibit 102, appears in
17 just the first one. So for some reason, it disappeared between
18 April and July of 2006, three-and-a-half, almost
19 three-and-a-half years after it was written. Why would
20 somebody go back three-and-a-half years later and delete an
21 e-mail?

22 Agent Hunt told you the whole account wasn't wiped
23 out. There wasn't appreciable differences between the volume
24 in batch 1 from April and the other two batches. This was
25 targeted, ladies and gentlemen.

1 The defendant knew that the FBI was investigating,
2 that there was a grand jury investigation, and that his work
3 was at issue. And what did he work on? Iran and nuclear
4 weapons programs.

5 THE COURT: Time's almost up.

6 MR. OLSHAN: Thank you.

7 The CIA has a right to keep its secrets secret for
8 the safety and security of the American people. The evidence
9 in this case has established that the defendant put his own
10 selfishness and his own vindictiveness ahead of the American
11 people. He made a decision to break his oath, and he made it
12 knowing full well the ramifications that his actions could
13 have.

14 It could mean scuttling a viable classified program
15 that was employed not just once but multiple times, and it
16 could mean endangering the life of Merlin, a man who had come
17 to this country with his family as a refugee, seeking a better
18 life, a man who had agreed to help the CIA and to put his life
19 at risk for his new country.

20 The defendant risked all of it, and for what?

21 Because he hated the CIA and he wanted to settle the score.

22 Those aren't the actions of a patriot, ladies and gentlemen.

23 Those are the actions of a criminal.

24 We have brought you the evidence. We have proven the
25 defendant was a source for Risen. We have proven that he knew

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1 the classified information that wound up in chapter 9. We have
2 proven that he had the motive to disclose those facts and the
3 letter so that they would get out to the public and harm the
4 CIA, and we have proven that he had a relationship with
5 Mr. Risen. We ask that you hold him responsible for his
6 actions because he's guilty of each and every offense charged
7 in the indictment.

8 Jeffrey Sterling was the hero of Risen's story.

9 Don't let him be the hero of this one. Thank you.

10 THE COURT: All right, Mr. Pollack?

11 Why don't you wait one second, Mr. Pollack, while we
12 get people settled.

13 MR. POLLACK: Your Honor?

14 THE COURT: Yes, sir.

15 CLOSING ARGUMENT

16 BY MR. POLLACK:

17 Ladies and gentlemen, make no mistake, this is a very
18 important case to the government. It has assigned a team, a
19 team of excellent lawyers. One of those lawyers, Mr. Olshan,
20 just laid out a compelling argument setting forth the
21 government's theory of how Mr. Sterling could have been a
22 source of national defense information published by Mr. Risen.

23 The government has great lawyers. It has a great
24 theory. It just made a great argument. What the government
25 lacks is evidence. Yesterday, Agent Hunt candidly admitted

1 that to you.

2 Explaining how something could have happened is
3 simply not enough. The government has to prove to you not
4 just, as Mr. Olshan said, that Mr. Risen was a source -- I'm
5 sorry, that Mr. Sterling was a source for Mr. Risen. It has to
6 point to national defense information contained in chapter 9
7 and present evidence to prove to you beyond a reasonable doubt
8 that Mr. Sterling was the source for that information and that
9 Mr. Sterling committed part of that crime in the Eastern
10 District of Virginia.

11 The government cannot do that because there is no
12 such evidence. The government's theory is not supported by
13 evidence. It's not even the most likely theory of what
14 actually happened.

15 The evidence, ladies and gentlemen, has shown that
16 everything that Mr. Risen wrote could have and likely did come
17 from sources other than Mr. Sterling and, yes, from people who
18 had their own motive to talk to Mr. Risen. Some of what
19 Mr. Risen wrote he got right. Some of it he got wrong.

20 The government has spent a lot of time in this trial
21 putting in evidence about the things that Mr. Risen got wrong,
22 but whether Mr. Risen's rendition of Classified Program No. 1
23 is accurate or not is not an issue in this case. Likewise, the
24 government has spent a lot of time putting on evidence about
25 how important Classified Program No. 1 was, how important to

1 the CIA; to the National Security Advisor, Dr. Rice; and even
2 to the President of the United States, George W. Bush.

3 Whether Classified Program No. 1 was a bad idea,
4 whether it was poorly executed, or whether it was the most
5 important intelligence operation this country has ever
6 undertaken is not an issue in this trial. These things may be
7 important to the CIA, they may be important to Merlin, they may
8 be important to the government, but they should not be
9 important to you.

10 Through this trial, the government has allowed the
11 CIA to tell its side of the story of Classified Program No. 1,
12 and it is a story very different than the one told by
13 Mr. Risen. Whether or not the CIA has been successful in this
14 trial in getting its reputation back is for others to judge.

15 If you're angry that Mr. Risen reported about a
16 highly classified program, if you're unhappy that his reporting
17 was not always accurate or even fair to the CIA, you cannot
18 take that out on Mr. Sterling. Mr. Sterling did not provide
19 national defense information about Classified Program No. 1 to
20 Mr. Risen.

21 Where is the evidence that Jeffrey Sterling in 2000,
22 before he left, printed out cables, snuck them out of the CIA,
23 then proceeded to sit on them for three years, only to give
24 them to Jim Risen in 2003? Where is the evidence that even if
25 he had done that, he would have remembered years later details

1 that aren't in any of those CIA documents, like the fact that
2 the mailbox in Vienna was on the left, the fact that Merlin
3 covered the plans with an old newspaper, details that Bob S.
4 and Merlin do remember?

5 Where is the evidence that Mr. Sterling would have
6 used language in describing the operation to Mr. Risen
7 like "high-voltage block" or "firing set" that Merlin and
8 Bob S. used, but there's no evidence that Mr. Sterling used
9 even when he was involved in the program three years earlier?

10 Mr. Sterling knew about Classified Program No. 1
11 since November of 1998. He lost access to the documents
12 related to the program in May of 2000. In August of 2001, he
13 filed a discrimination suit against the CIA. He was told he
14 was being fired from the CIA in October of 2001.

15 Mr. Risen wrote about Mr. Sterling's discrimination
16 suit in *The New York Times* in March of 2002. By March of 2003,
17 Mr. Sterling had known about Classified Program No. 1 for
18 years. He had been upset about his treatment at the agency for
19 years. He had been in litigation with the CIA for years. He
20 had made settlement offers, he had had settlement offers
21 rejected for years. And he had known Mr. Risen for at least a
22 year if you believe the government that he was the source for
23 confirmation of a publicly known fact that the CIA had an
24 office in New York at 9/11. He had known Risen for longer than
25 that because that article was in November of 2001.

1 Yet all of this time, there is no evidence that
2 Mr. Risen knew anything about Classified Program No. 1. In
3 March of 2003, Mr. Sterling legally talked to SSCI, the Senate
4 Select Committee on Intelligence, about Classified Program
5 No. 1. Less than a month later, Mr. Risen calls the CIA,
6 Mr. Harlow, to tell him that Mr. Risen, that he knows about
7 Classified Program No. 1.

8 Why does Mr. Risen learn about Classified Program
9 No. 1 then? Why? Because the Hill had just learned about it
10 then. SSCI had just learned about it then from Mr. Sterling.
11 And as often happens, people on the Hill talk, and when they
12 do, reporters like Mr. Risen listen, and then they go out and
13 investigate what they've learned, and that's why they win
14 Pulitzer Prizes.

15 Mr. Risen went to his sources to see what he could
16 learn after finding out from SSCI that a former CIA officer,
17 Jeffrey Sterling, had come in with complaints about a program,
18 and he started calling his CIA sources, and what happened?
19 They became very alarmed.

20 Now, Bob S., he told you that he was a colonel, but
21 he also told you that there were a lot of generals above him,
22 and when the generals learned that Jim Risen of *The New York*
23 *Times* had a story about a classified program and were afraid
24 that he was going to disclose it, they told Bob S. to brief
25 them on that program, and Bob S. told you, "I went back and I

1 accessed the cables in 2003 so I could brief the generals."

2 Now, the CIA and National Security Advisor
3 Condoleezza Rice both worked to kill the story. Dr. Rice told
4 you the administration had two tactics when trying to kill a
5 story. One is to confirm the story unofficially and ask the
6 reporter not to publish it.

7 The other, the one chosen here, was to try to
8 convince the author that he was jeopardizing national security
9 and that he had the story wrong. The problem with this tactic
10 is that you have to give the reporter additional information to
11 try to convince them that he has the story wrong.

12 Now, Dr. Rice, she only participated in a single
13 meeting, and she told you she doesn't know what the generals at
14 the CIA did separately. And what the evidence in this trial
15 shows is what they did is they fed Mr. Risen information and
16 documents about the program to try to convince him that the
17 story was wrong and that he would jeopardize national security
18 by publishing it, and in doing so, they gave him more detail
19 about the program than what Mr. Risen had learned from SSCI.

20 Did Bob S. have a motive to feed information to
21 Mr. Risen? Absolutely he did. His program, his baby is about
22 to be in *The New York Times*. He has every incentive to feed
23 CIA cables to Risen and convince him this wasn't a screwed-up
24 program; this was an excellent program.

25 Merlin, does Merlin have a motive to assist in that

1 process? Merlin thinks his life is going to be in danger if
2 this program is disclosed. Does he have a motive to get
3 information, directly or indirectly, to get information to
4 Risen to get this story killed? You bet he does.

5 But their strategy ultimately backfired. As
6 Mr. Trump put it in the opening, they won the battle, but they
7 lost the war. Mr. Risen not only ends up writing the story
8 later in a book, but he's now armed with a lot more detail,
9 detail that came from the CIA in its failed effort to kill the
10 story.

11 Worse yet for the CIA, the story is still written
12 from essentially the same perspective, in some ways an accurate
13 perspective, that Mr. Risen started with when he learned
14 secondhand about Mr. Sterling's meeting on the Hill, and the
15 story made the CIA look bad.

16 So let's start with Mr. Sterling's meeting on the
17 Hill. Mr. Sterling had no documents with him. That makes
18 sense. He hadn't had access to documents in years.

19 He said that current events -- now, remember, this is
20 right before the United States is going to invade Iraq, based
21 in part on Iraq's supposed program of weapons of mass
22 destruction. Mr. Sterling says in that environment of current
23 events, he decided he wanted to come in and talk to SSCI about
24 concerns he had about a weapons of mass destruction
25 counterproliferation program he had worked on.

1 Now, we know that Mr. Sterling did not have much of a
2 technical background, and he was taken aback in San Francisco
3 when he saw that Merlin's immediate reaction on seeing the
4 plans was to say that there was something wrong with them, and
5 we know he tried to raise that with Bob S.

6 Now, Bob S. might have thought he was being tactful,
7 but as Merlin put it, Bob S. told Jeffrey Sterling to shut up,
8 and the plans were not changed. Sterling had raised his
9 concerns with his superior and was told to shut up. He was
10 already having problems with the agency, and he believed he was
11 being held to an unfair standard. Is it surprising that he
12 didn't feel comfortable raising the issue again?

13 He went to the Inspector General of the CIA with his
14 employment issues in December of 1999. All he was told was
15 that he could appeal his complaints internally with the CIA.
16 The Inspector General closed its file on Jeffrey Sterling two
17 days after it opened it. That's Government's Exhibit 34. Is
18 it surprising that Jeffrey Sterling didn't take his concerns
19 about Classified Program No. 1 to the Inspector General?

20 Okay. Why didn't he go to SSCI sooner? You can take
21 him at his word, he was prompted by current events, or you can
22 believe that he had grown so disappointed with the agency by
23 this point that he was no longer to accept their assurance that
24 this was a good program and wanted somebody outside of the
25 agency to take a look at it.

1 Either way, Sterling legally told Ms. Divoll and
2 Mr. Stone about the program and about his concerns. You heard
3 their testimony: He was calm. He was rational. He did not
4 claim it was a rogue operation. He did not claim that the CIA
5 had just handed blueprints for a working fire set to the
6 Iranians. What he did was he told Mr. Stone and Ms. Divoll
7 that he had concerns about the program that had never been
8 addressed to his satisfaction.

9 Go ahead and put up Government Exhibit 101.

10 He told them that the human asset immediately saw
11 that there were problems about the plans. He was concerned
12 that Iran might be able to figure out and correct some of the
13 problems with the plans and that if they did, they might learn
14 new information about a nuclear fire set that they didn't have
15 before.

16 Whether he is right or he is wrong, whether that
17 concern is justified or is not justified -- let me start with
18 that third paragraph -- is not the issue. He expressed his
19 concern.

20 The second concern he expressed to SSCI was that he
21 did not think the CIA should have given the Iranians the fire
22 set plans all at once. By just leaving the plans, there was no
23 way to assure that the Iranians would follow up. They might
24 just take what we gave them, learn something from it, or sell
25 them.

1 And we know that, in fact, in the almost six years
2 from the time that the plans were left in Vienna to the
3 publication of *State of War*, the Iranians never did follow up
4 with Merlin. But again, whether Sterling's concern was
5 justified or not is not the issue. He was legally expressing
6 his concerns.

7 And he was not told how, if at all, SSCI was going to
8 follow up. Yet he seemed satisfied with the visit. That's
9 what Mr. Stone wrote in his memo.

10 Mr. Stone now says that he recalls in the reception
11 area after the meeting Mr. Sterling's lawyer making some
12 comment about wanting the CIA to act quickly, didn't know if
13 that related to the employment issues or related to Classified
14 Program No. 1. No mention of the press, but Mr. Stone from his
15 experience with other people thought that that was a reference
16 to the press.

17 But Ms. Divoll said that that didn't happen at all.
18 Ms. Divoll said that there was no such threat, no suggestion
19 that any drastic action was going to be taken such as going to
20 the press. And it's not reflected in Mr. Stone's memo.

21 And Ms. Divoll was there the entire time. Remember,
22 Ms. Divoll said she ended up escorting Mr. Sterling out of the
23 offices. If this happened, it would have to have happened in
24 Ms. Divoll's presence, and she says it didn't happen at all.

25 Special Agent Hunt told you that she had heard a

1 rumor that Sterling's lawyer had made such a threat. Again,
2 not clear whether it related to going public with the
3 employment concerns, which he had every right to do, or if it
4 related to Classified Program No. 1. So Special Agent Hunt
5 tried to chase that rumor down, and guess what? She wasn't
6 able to corroborate it.

7 She wasn't able to corroborate it because there was
8 not a threat to go public with Classified Program No. 1. What
9 Mr. Sterling did with Classified Program No. 1 was he legally
10 talked to SSCI about it.

11 Now, Mr. Stone says that at some point afterwards,
12 Mr. Risen called him, and claims that Mr. Stone did not speak
13 with Mr. Risen. Agent Hunt's phone record search did not find
14 that call.

15 Now, that could mean that Mr. Stone is lying about
16 that call, but it could also mean that phone records -- a phone
17 record search would not show a call through the Senate
18 switchboard, and if that's true, that means that anyone at SSCI
19 could have had a phone conversation with Mr. Risen about
20 Mr. Sterling's meeting there.

21 Ms. Divoll said that while her old boss had a
22 relationship with Mr. Risen and asked Ms. Divoll to talk to the
23 press on occasion, she said that she never talked directly to
24 Risen, doesn't know him. Now, you can believe that or not
25 believe it. It doesn't matter whether Ms. Divoll directly

1 spoke to the press.

2 What we do know is that when Ms. Divoll shared closed
3 door SSCI business with someone outside the committee within a
4 week of when Mr. Stone's memo was written, what she disclosed
5 ended up in *The New York Times* the very next day in a story
6 written by Jim Risen.

7 Now, the Senate is a very -- the Senate Committee on
8 Intelligence, Ms. Divoll told you, is a very partisan place.
9 The Republicans had just taken over. Democrats love stories
10 that embarrass Republicans. Here was a former CIA officer
11 coming in with concerns about a counterproliferation weapons of
12 mass destruction operation right before the invasion of Iraq.
13 Was there someone on the Hill who wouldn't have minded getting
14 that story out to the press?

15 Mr. Goco told you that he didn't really have a way to
16 follow up after asking the CIA about the program at his next
17 scheduled meeting, so SSCI didn't do anything further in
18 response to Mr. Sterling's concerns. Mr. Sterling would not
19 know that. He was not told what action SSCI would take, but if
20 we look at the book, at page 211, at paragraph 92, it tells us
21 that SSCI took no action, something that Mr. Risen had to have
22 learned from SSCI.

23 What did Sterling tell Stone and Divoll? Again, this
24 is Government Exhibit 101. He told them that the program
25 involved getting faulty plans for a fire set to Iran. He told

1 them that the National Labs had modified the plans. Both Stone
2 and Divoll recall that Sterling mentioned a Russian scientist,
3 and Divoll recalls that the plans were passed to the Iranians
4 in Europe.

5 Call up 106, please.

6 Less than a month later, Jim Risen is calling
7 Mr. Harlow at the CIA. What does he know about the program
8 when he calls Mr. Harlow? He knows it involves faulty plans
9 for a fire set. He knows that the plans were modified at the
10 National Labs. He knows that the operation involved a Russian
11 scientist.

12 Did, did the memo get all the details right about the
13 Russian scientist? No, but Mr. Sterling told the Hill about a
14 Russian scientist. Mr. Risen knows it, and he knows that the
15 plans were given to Iran in Europe, exactly what Vicki Divoll
16 recalls from that meeting. Not Vienna, in Europe.

17 And he knows that it happened in 2000, and he doesn't
18 know if the program is still in operation. In other words, he
19 knows exactly what Jeffrey Sterling told Divoll and Stone.

20 Now, the government has pointed out that Risen also
21 knew that the code name was Merlin and neither Stone nor Divoll
22 remember that Sterling mentioned the code name Merlin. He may
23 have and they didn't remember it when they wrote up their memo
24 seven weeks later, or Risen could have gotten that information
25 afterwards, when he followed up on the information that he

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1 learned from SSCI.

2 In this first call with Mr. Harlow, Mr. Risen also
3 says that he knows that the program had been approved by
4 President Clinton and wants to know if Bush had reapproved it.
5 There is no evidence that Mr. Sterling told Divoll or Stone
6 anything about President Clinton approving the program, but
7 Stone and Divoll told you that others on SSCI already knew
8 about Classified Program No. 1 before Sterling came in.

9 If Risen followed up with people on the Hill, people
10 like Bill Duhnke, the Republican partisan, asking questions
11 about a supposedly flawed program, would that person tell Risen
12 that that was a program that was approved by a Democratic
13 president?

14 Now, as you know, when the book finally comes out,
15 it's not just the version that Mr. Sterling told SSCI. It's
16 that version on steroids. Now it's not just Mr. Sterling who
17 has concerns about the program; it's Merlin himself who has
18 concerns about the program. He's wandering around Vienna,
19 concerned that he's about to give a nuclear, working nuclear
20 fire set to the Iranians in a rogue operation.

21 Now, how did that happen? Sterling said that Merlin
22 immediately saw a problem with the plans, and he said that
23 Merlin later got cold feet. Both are true, but Risen puts them
24 together to create an impression that is not accurate. But
25 it's also not something that Mr. Sterling ever said.

1 Risen does not ultimately tell Mr. Sterling's story.
2 Mr. Risen tells Mr. Risen's story. Now, whether Mr. Risen was
3 simply mistaken because he misunderstood some of the facts,
4 whether he was engaging in hyperbole to sell a book, or whether
5 he found others that gave him a different version than Jeffrey
6 Sterling told the Hill does not matter. Chapter 9 is Risen's
7 story; it is not Sterling's story.

8 After the first call from Risen to Mr. Harlow, both
9 the CIA and the NSC, the National Security Council, are
10 alarmed. We know that. Bob S. starts accessing cables to
11 brief the generals at the CIA. On April 3, that first phone
12 call, Risen was unsure whether the program was still in
13 operation.

14 Let's go to Exhibit 112, if we can. It's now April
15 25. It's three weeks later, and Mr. Risen calls the CIA again.
16 Has Mr. Risen been sitting on his hands for these three weeks,
17 or has he gone out and got additional information from what he
18 learned from the Hill?

19 Risen now knows that this is an ongoing program.
20 Indeed, the lead for his story, he tells Mr. Harlow, is that
21 the United States has had an ongoing program, something he
22 didn't know three weeks earlier, and more importantly,
23 something that Mr. Sterling, who hadn't been at the agency for
24 years, did not know and could not have told Mr. Risen.

25 Mr. Risen got that by talking to CIA sources after he

1 talked to the Hill. He now knows, he now knows that the
2 program involved nuclear firing sets, plural, and that it was
3 part of a larger program to inject flawed designs into Iran.

4 Now, when Sterling was on the Hill, he used the
5 term "fire set." It's in Exhibit 101. It's also the term
6 Risen used when he called Harlow initially. It's in 106.

7 Now, in 112, Risen is using the term "firing set,"
8 the term that Bob S. used in cables.

9 And by April 25, Mr. Risen tells Harlow he has
10 documents, something he did not say on April 3. Where did he
11 get those documents? He got those documents from people that
12 knew that in 2003, this was an ongoing operation, wanted to
13 convince Risen of that, and wanted to kill the story.

14 Now, "fire set" and "firing set" may be the same
15 thing -- may mean the same thing. Mr. Sterling says tomato;
16 Mr. S. says "tomato"; they mean the same thing; but Risen has
17 now switched from using the language that Sterling used when he
18 talked to the Hill to the words that Bob S. uses in cables.

19 Now, Risen only knows that they're running this
20 operation against Iran, and that's all he's asking about.
21 There'd be no reason for the CIA generals to tell him: Oh, by
22 the way, we're also running it with these other countries.

23 They don't want to give him information that he
24 doesn't have and isn't going to write about. What they want to
25 do is convince him that he's wrong about what he does want to

1 write about, and so they want to give him more information
2 about the Iranian operation, the Vienna operation, to convince
3 him that he's got it wrong.

4 Now, where did the information that Risen got come
5 from? Let's talk about Merlin. Merlin is told by Bob S.
6 there's been a leak. Merlin, according to Bob S., has chutzpa.
7 Merlin, according to Bob S., was chosen for this program
8 because Merlin is willing to take risks and do them in a way
9 that they won't be traced back to the CIA.

10 What does Merlin recall about the San Francisco
11 meeting? In his testimony, he was asked, "Who attended the
12 meetings in San Francisco?"

13 And the judge is going to instruct you it is your
14 recollection of this testimony that controls, not mine, but let
15 me suggest to you that I believe that he testified that in San
16 Francisco, he met Jeff for the first time. There was another
17 CIA person there, I believe Lenny Bob, if I remember correctly.
18 There was a representative from the National Laboratory.

19 Mr. Trump says, "There was?"

20 "Yes, from Los Alamos or Sandia."

21 Now, we know from everybody else's testimony that, in
22 fact, there was nobody from the National Laboratories at the
23 meetings in San Francisco. Merlin is mistaken. He's the only
24 one who believes that there was a representative of the
25 National Laboratories there.

1 What does the book say? Page 98, paragraph 125: "In
2 a luxurious San Francisco hotel room, a senior CIA official --
3 Bob -- involved in the operation, walked the Russian through
4 the details of the plan. He brought in experts from one of the
5 National Laboratories to go over the blueprints that he was
6 supposed to give to the Iranians."

7 Also, the book uses the word "blueprints." That's a
8 word that does not appear in any cable. I asked Bob S. about
9 the term "blueprints," and Bob S. told me that would be an
10 inaccurate term. But Merlin testified, not in response to any
11 question, in his own terminology: "What was discussed at the
12 meetings in San Francisco?"

13 "The schematics and blueprints were introduced."

14 "This letter, what were you supposed to do with the
15 letter?"

16 "I was supposed to pass it to the Iranians with
17 documents, blueprints, and schematics."

18 The only person affiliated with Classified Program
19 No. 1 who uses the word "blueprints" is Merlin. The
20 term "blueprints" appears in chapter 9 repeatedly. By my
21 count, "blueprint" or "blueprints" appears in chapter 9 at
22 least 20 times.

23 The note. The cables and the testimony make clear
24 that it was decided in advance that there will be a note to the
25 person in Vienna on the outside of the envelope, the inside of

1 which would contain the plans and a cover letter directed to
2 the person back in Iran, but Merlin, Merlin testified that on
3 the spot in Vienna, he had the idea to write a handwritten
4 cover note when he realized he was going to have to leave the
5 package at a mailbox rather than give it to somebody.

6 "I have the time to think, and I realize nobody's in
7 the office. I, I thought it would be suspicious, somebody puts
8 this very expensive documents, these very important documents
9 without any explanation, and I decided to wrote very short this
10 sized note where I said I came many times to your office. It
11 was closed. Please take attention to this envelope. This is
12 important and valuable information."

13 Merlin returns, and he's debriefed by Bob S. and
14 Mr. Sterling together. The cable of that debriefing is Exhibit
15 44. It does not mention a handwritten cover note by Merlin.
16 Review it carefully. Only Merlin knows about this note.

17 What does the book say? Page 204 in paragraph 57:
18 "In Vienna, the Russian went over his options one more time and
19 made a decision. He unsealed the envelope with the nuclear
20 blueprints and included a personal letter of his own to the
21 Iranians."

22 Now, Risen gets a lot of things wrong here. He
23 thinks that this personal note that he quotes at length is
24 actually the cover letter that was done in advance, the draft
25 of which appears in Exhibit 35. He also thinks that the letter

1 is warning the Iranians of flaws in the plans rather than
2 telling them that the plans are incomplete.

3 But what is important is not what Mr. Risen got
4 wrong; what is important is what Mr. Risen got right, that
5 Merlin wrote a personal note on the spot in Vienna that had not
6 been planned in advance. Merlin knows this. It is not
7 reflected in any cable, and it ends up in Mr. Risen's book.

8 The times that things happened, "Merlin, what time
9 did you get inside the office building?"

10 "The first time I came about 8 a.m. on a Friday. The
11 office was closed. I came back after lunch, like 1 or 2 p.m."

12 Look at Exhibit 44, the debriefing. No time is
13 reflected. Bob S. testified he didn't recall Merlin ever
14 telling him the times.

15 What does the book say? Page 205, paragraph 67: "By
16 8 a.m., he found 19 Heinestrasse."

17 Page 206, paragraph 71: "At 1:30 p.m., I got the
18 chance to be inside of the gate." That one is in quotes.

19 Merlin testified that the times were 8 a.m. and
20 between 1 and 2 p.m. The book says 8 a.m. and 1:30 p.m. and
21 quotes Merlin.

22 Mr. Risen reports that this information came from a
23 document that Merlin later wrote. That's at page 206,
24 paragraph 71. But Merlin and Bob S. both testified that Merlin
25 did not write any report of his trip to Vienna. The

1 information is not in any cable.

2 After the generals at the CIA learned that Risen had
3 the story and were asking for information about Classified
4 Program No. 1, did Bob have Merlin write him a report of the
5 trip that someone at the CIA leaked to Risen? There's no
6 evidence that the time is written out anywhere. Whether or not
7 they were, we know that Merlin knew them, and they end up in
8 the book.

9 We've talked about the terminology, the fact that
10 "high-voltage block" is the Russian term and that "firing set"
11 is Bob S.'s term, and that's what ends up in the book.

12 There's a quote from Merlin at page 203, paragraph
13 50, where he's asking for directions. Now, Merlin says in his
14 testimony that he did, in fact, know enough German that he
15 could have asked for directions, but he claims that he wouldn't
16 have because it would look suspicious for a Russian scientist
17 to ask for directions to the address of the IAEA.

18 Now, it's not at all clear why that makes sense.
19 Remember, this is a building that has not just the IAEA Mission
20 in it; it also is an apartment building. Why would it be
21 suspicious for somebody to ask for an address for an apartment
22 building?

23 But that doesn't matter because the book doesn't say
24 that he asked for the address. It just says that he asked if
25 people knew where that street was. There would be no reason

1 for Merlin not to have asked where the street was. There's no
2 place that it's in a cable, and it's in quotations attributed
3 to Merlin in the book.

4 Ladies and gentlemen, most importantly, the cover
5 letter. The cover letter is at the heart of most of the
6 charges in this case. That's the document that supposedly
7 Mr. Sterling leaked to Mr. Risen, gave to Mr. Risen, physically
8 gave the document itself. There's no evidence, no evidence
9 that Mr. Sterling had that letter ever.

10 Now, in Merlin's testimony, he admitted the drafts of
11 the cover letter were typed on his home computer. He would
12 talk to -- take a printout to Mr. Sterling, they would go over
13 it, they would talk about revisions, and then Merlin would take
14 the paper back to his house, make the revisions on his home
15 computer.

16 The cover letter is quoted at length at pages 204 and
17 205 of the book. This is a real problem for Merlin if the only
18 version of that letter resides on his home computer. As
19 Mr. Olshan says, so on cross-examination, he claims that he
20 gave a copy of the final version of the letter to Mr. Sterling
21 when he met him about two weeks before leaving for Vienna.

22 There's one problem with that testimony: It's not
23 true. I mean, go ahead and put up that timeline.

24 We know Exhibit 35 is a January 10, 2000, meeting
25 between Merlin and Mr. Sterling where they come up with the

1 fifth version of the cover letter, which Mr. Sterling then in a
2 cable sends on to headquarters.

3 On January 14, 2000, Exhibit 36, Bob S. writes the
4 cable directing that the words "for free" be added to the
5 letter. Mr. Olshan talked about this.

6 On February 14, 2000, there's a meeting between
7 Merlin, Bob S., and Mr. Sterling. This is the meeting that
8 Merlin storms out of. Bob S. did not say that Mr. Sterling was
9 given a copy of the final letter at this meeting. It's not
10 reflected in the cable, and you can be sure if Mr. Sterling was
11 given a copy of that letter, it would have to have been
12 reflected in that cable.

13 On February 21, 2000, there is a meeting, this is the
14 final meeting, it's Exhibit 38, between Bob S. and Merlin.
15 This meeting takes place without Mr. Sterling being there.

16 And then on March 3, Merlin delivers the cover letter
17 and the plans in Vienna, and that's in Defendant's Exhibit 3.

18 As Mr. Olshan noted, the version that's in the book
19 includes the "for free" language. It is the final version of
20 the letter. It is the version that resides on Merlin's
21 computer.

22 Merlin told you he did not bring back a version of
23 this letter from Vienna. The only place it resides is on his
24 computer. So Merlin says, "Well, I gave a copy to Jeff two
25 weeks before I left when I met with him."

1 He didn't meet with Jeff alone two weeks before he
2 left. The last time that he met alone with Jeff before he left
3 is on January 10, two months earlier, and at that point,
4 the "for free" language didn't exist yet. He couldn't have
5 given Mr. Sterling a copy of the final letter with the "for
6 free" language, the copy that appears in the book, he could not
7 have given that to Mr. Sterling two weeks before he left. He
8 couldn't have given it to Mr. Sterling at any time because he'd
9 never met alone with Mr. Sterling when that language existed.

10 Merlin's mistaken belief that someone from the
11 National Labs was in San Francisco, that Merlin decided at the
12 last minute to include a personal cover note, the term
13 "blueprints," "high-voltage block," the times that Merlin got
14 into the building, the quote asking for directions, and most
15 importantly, the final version of that letter, all of those
16 things came from Merlin. Merlin attempted to mislead you
17 otherwise.

18 Bob S. Directly or indirectly, Bob S. was likely a
19 source for chapter 9. In 2003, in 2004, in 2005, Mr. Sterling
20 no longer has access to cables. Bob S. does. Mr. Sterling
21 (sic) also still has access to Merlin. Mr. Sterling does not.

22 Bob S. designed disinformation campaigns and created
23 legends for a living. To quote none other than the Rolling
24 Stones, he was practiced in the art of deception, and he had
25 Merlin, who had chutzpah. Whether he gets the information from

1 Merlin and passes it on himself, whether he gets the
2 information from Merlin and passes it on through others,
3 whether Merlin passes it on, it has to be some combination of
4 people that still have access to the program.

5 What is in the book that sounds like it came from Bob
6 S.? We've discussed the term "firing set."

7 The Wine Country. Mr. Olshan tells you that's right,
8 Sonoma is not in any cable. Now, it's true that Mr. Sterling
9 would have known that, but is that a fact that Mr. Sterling is
10 going to remember years later?

11 We know that Bob S. remembers it now, 16 years later,
12 because it's important to him because he cares about wine, and
13 to him, there's a big difference between Napa wine and Sonoma
14 wine, but there's no reason for this detail to be important to
15 anybody else, and this detail that is uniquely important to Bob
16 S. is in the book.

17 The book details the names of various streets in
18 Vienna, a city that Bob knew well even before he went there on
19 more than one occasion to case for this operation. There's no
20 evidence that Mr. Sterling's ever been to Vienna. Who would
21 remember the details about these street names years later, Bob
22 S. or Mr. Sterling?

23 More tellingly is Bob S. in his testimony recalled
24 that the mailbox in which Merlin left the package was to the
25 left of the door. Look at Exhibit 44, the debriefing cable.

1 It's not in there. Yet this detail appears in the book at page
2 206, paragraph 71.

3 Why would Jeffrey Sterling remember that detail years
4 later? We know that Bob S. did either on his own or because he
5 had talked again to Merlin.

6 Even more telling, Bob S. in his testimony recalled
7 that Merlin saw an Austrian postman and that he covered the
8 package with a newspaper. Neither of those details is in
9 Exhibit 44 or any other cable. Even if Mr. Sterling had
10 somehow secreted cables with him and held them for three years,
11 he wouldn't know this unless he remembers it. There's no
12 evidence he would remember those details, but Bob S. remembers
13 both, the postman and the newspaper. Whether he remembers them
14 on his own or because he's talked to Merlin, both appear in the
15 book.

16 Why is it particularly telling that he recalls these
17 details? Remember, Bob S. tried to explain away how Risen
18 could have known that the mailbox was on the left. Maybe Risen
19 saw that when he traveled to Vienna. But Bob S. couldn't
20 explain away how it is Risen could possibly have known that
21 Merlin saw an Austrian postman or that he left the plans under
22 a newspaper. Only Merlin could know that, and it's not in any
23 cable.

24 The national defense information that appears in
25 chapter 9 that did not come from the Hill came from Merlin, Bob

1 S., or someone at the CIA.

2 What was Mr. Sterling's relationship with Mr. Risen?

3 Because Mr. Olshan is correct, they clearly did have a
4 relationship. Was Mr. Sterling hiding that fact? You saw
5 Exhibit 83. He's got his picture in *The New York Times* in a
6 story by Jim Risen where he's quoted in his own name. Of
7 course he has a relationship with Mr. Risen.

8 And absolutely, Mr. Risen is writing about his
9 employment discrimination suit, and Mr. Sterling is given
10 unclassified PARs as part of that suit. You haven't heard it's
11 illegal in any way for him to give those unclassified PARs to
12 Mr. Risen, who's following his employment discrimination suit,
13 and yes, he wants attention to that suit both inside and
14 outside of the agency. That's why he hired outside lawyers,
15 that's why he filed a lawsuit, and that's why he wants that
16 lawsuit publicly covered.

17 And yes, part of Exhibit 59 is quoted in Exhibit 3,
18 Risen's story, and yes, and part of 60 is quoted in chapter 9.
19 By 2006, when Mr. Risen publishes the book, how does he know
20 that the PAR he obtained back in 2002, the report on Sterling's
21 discrimination suit, is talking about Merlin?

22 He knows that Sterling speaks Farsi and is an Iranian
23 expert. He reports that in Exhibit 83. He knows that Sterling
24 worked in New York from January '99 until 2000. He knows after
25 talking to the Hill in 2003 that Sterling came to talk about an

1 asset that had been used in an operation in 2000 against Iran,
2 and from talking to whoever his sources were at the CIA after
3 he had talked to the Hill, he knew that Merlin was a known
4 handling problem, demanding, overbearing in nature, walked out
5 of meetings. Mr. S. described him as a difficult asset. The
6 cables describe him as somebody unable to follow even the
7 simplest and most explicit direction.

8 How hard would it be for Mr. Risen to piece together
9 that when he's got a PAR praising Sterling's handling of a
10 known -- of an asset who's difficult, demanding, overbearing,
11 and a known handling problem, how hard would it be for him to
12 figure out that that asset was Merlin?

13 In 2003 -- well, again, 2003, Mr. Sterling goes to
14 SSCI to talk about Classified Program No. 1. Risen is
15 following the discrimination suit. Risen learns from the Hill
16 that Sterling has been out talking about the classified
17 program. Risen and Sterling have several conversations in this
18 period.

19 Is Risen trying to get information from Sterling
20 about Classified Program No. 1? Almost certainly. Does that
21 mean that Sterling gave him any? No.

22 What do we know that he gave him? Risen comes to him
23 and says, "Hey, heard you were up on the Hill talking about
24 this classified program."

25 Sterling sends him an e-mail with a publicly

1 available CNN article and says, "Yeah, makes you wonder."

2 That's what he passed on to Mr. Risen when he was
3 asked about Classified Program No. 1. He talks to Mr. Risen
4 about his discrimination suit.

5 Mr. Risen is able to keep his discrimination claims
6 and his concerns about Classified Program No. 1 separate. We
7 know this. When he talks to HPSCI, he talks about the
8 employment discrimination claims. He doesn't talk about
9 Classified Program No. 1. When he talks to SSCI, he talks
10 about Classified Program No. 1. He doesn't talk about his
11 employment claims. And in March 2002, he talked to Risen about
12 his discrimination case and did not talk to him about
13 Classified Program No. 1.

14 Over the years, Sterling and Risen have spoken a
15 number of times, but there's no evidence, no evidence that they
16 speak about Classified Program No. 1 in a way that Mr. Sterling
17 is providing him national defense information. Mr. Olshan says
18 that Sterling is the hero of chapter 9. I don't know if that's
19 accurate or not. We know that Sterling has a relationship with
20 Risen and we know that Risen seems to have some sympathy for
21 Sterling if you read that article, article 83.

22 But more importantly, how, how does the chapter
23 portray Merlin? Mr. Olshan said as a bumbler. That's funny,
24 the cables say he can't follow the simplest direction. He
25 can't even find the mission after having been given explicit

1 instructions.

2 Mr. Olshan says that the chapter portrays Robert S.
3 as pushing forward with the program -- Robert S. was pushing
4 forward with the program -- and that Jeffrey Sterling is
5 portrayed as a competent case officer. Guess what? He was.
6 Read those PARS. Every witness on the stand said that he did a
7 good job. Even, even Bob S. said he did a good job on this
8 operation. If you read the PARS, he got high marks for the
9 operations. He got high marks for his security measures.

10 Their criticism of him was that he didn't go -- not
11 how he handled the cases that he was given but that he didn't
12 do enough to go out and develop new cases.

13 Let's look at the timeline. If we can go ahead and
14 put up that modified Exhibit 98?

15 This is the government exhibit, but I've added, I've
16 added some things that the government didn't put on the
17 timeline. On March 3, the PRB suit that has been in the works
18 for a couple of months is filed by Mr. Sterling's lawyer
19 against the CIA. March 6, there is an order that transfers his
20 employment discrimination suit from New York to Virginia.

21 Mr. Olshan said in this time frame in March,
22 Mr. Sterling is out of options. He's not out of options. His
23 case has just been transferred to Virginia, and it's going to
24 move forward. That's Exhibit 94.

25 After the public PRB suit is filed and after the

1 public order transferring the case, he has a number of
2 conversations with Mr. Risen. What were they likely talking
3 about? The PRB suit and the discrimination suit.

4 Let's go to page 4. On March 3, 2004, a year later,
5 the employment discrimination suit is dismissed by the Virginia
6 court. And again, there are a series of conversations over the
7 next couple of months between Mr. Sterling and Mr. Risen, about
8 27 minutes' worth of conversations in March, about 43 minutes
9 of conversations by mid-May, in the two months since the
10 employment suit was dismissed.

11 And let's go to page 7. What does Risen say? "I am
12 sorry if I have failed you so far."

13 How has he failed him? He hasn't written a single
14 article about the dismissal of the employment discrimination
15 suit. He hasn't followed up on the employment discrimination
16 suit with any published article since 2002. "But I really
17 enjoy talking to you, and I'd like to continue. Jim."

18 Now, if we can go to page 10?

19 In July of 2004, according to the records pulled by
20 Agent Hunt, Mr. Risen goes to Vienna to research the book. In
21 September of '04, he submits the book proposal. These are
22 Exhibits 128 and 129. In this period of time, when he's
23 clearly, when Risen's clearly working on the book, how many
24 conversations does he have with Jeffrey Sterling? None.

25 And finally, the government points out that their

1 relationship seemed to end at the end of 2005 and notes that
2 the book was published in January of 2006, and that's true, but
3 it's also true that in January 2006, Agent Hunt told you this,
4 the Supreme Court decided not to take the appeal from
5 Mr. Sterling's employment discrimination suit. Their
6 relationship ends when the employment discrimination suit ends.

7 The government's suspicion of Jeffrey Sterling is not
8 evidence. As we learned, Benjamin Franklin said that three can
9 keep a secret if two of them are dead. In this case, at least
10 90 people had a secret. Someone, several people didn't keep
11 it. But the evidence of one who did, who time and time again
12 went through legal channels, was Jeffrey Sterling.

13 So what does the government rely on? They rely on
14 1987 telephone rotary phone instructions and an interim
15 evaluation report from when he was a trainee in 1993 that they
16 find in his house. Nothing to do with the charges in this
17 case, nothing to do with Classified Program No. 1, nothing to
18 do with any other classified operation.

19 He shouldn't have had those documents in his house,
20 but they're not evidence that he disclosed national defense
21 information about Classified Program No. 1 to Jim Risen.

22 The obstruction of justice charge. From August 3 --
23 sorry, from August of 2003 to July of 2004, Mr. Sterling had
24 use of the computer in the Dawson home. That's in stipulation
25 11. On April 19, 2006, two years later, data is preserved at

1 hotmail, and this March e-mail to Mr. Risen with the CNN
2 article is still on there. By July 14, it's no longer in the
3 hotmail account.

4 Mr. Risen is served with a grand jury subpoena on
5 June 16, 2006. That's Exhibit 139. Look at the attachment to
6 139. 139 tells Mr. Sterling that there's a grand jury
7 proceeding. It also tells him what the grand jury wants him to
8 bring with him in the way of documents. It wants him to bring
9 any classified documents he has. It wants him to bring PARs
10 that he has. Clearly, they're looking for those 1999 and 2000
11 PARs that have been quoted by Risen. It says that it wants
12 information about his time at the agency.

13 There is not a single category in there of things
14 that they're interested in that has anything to do with his
15 communications with Risen about publicly available information.

16 The computer is turned over by Ms. Dawson to the FBI
17 in August of '06. If that e-mail is not there, that would mean
18 Mr. Sterling deleted it, he would have had to have deleted it
19 by 2004, two years earlier, when he lost access to the
20 computer.

21 If it is still there, it means that he didn't delete
22 it; it's still there. The government has not explained to you
23 how it is that Mr. Sterling had the ability to get into
24 hotmail's database and delete it from hotmail's records.

25 Also, we have no idea when it was that it got deleted

1500

1 from hotmail or why. Mr. Sterling's not put on notice to the
2 grand jury until June, and the data is preserved again in July.
3 That could have been deleted anytime between April and July,
4 before Mr. Sterling even knew about the subpoena, the subpoena
5 that tells him that they're not interested in this e-mail.

6 So you now have to believe that Mr. Sterling kept
7 the, the e-mail on his computer but then somehow got into
8 hotmail's records to delete them because he was put on notice
9 of the fact that the grand jury was not interested in this
10 document. There is no obstruction of justice in this case.

11 Now, ladies and gentlemen, all of our lives would
12 have been a lot easier if Mr. Risen would have revealed who his
13 sources were and who they were not for his reporting on
14 Classified Program No. 1, but he didn't, and whether you think
15 that's a good thing or a bad thing is no more relevant than
16 whether you think Classified Program 1 was a good program or a
17 bad one or Mr. Risen's reporting good or bad.

18 The government says that chapter 9 is only about
19 Jeffrey Sterling's time with the program. Well, they say that
20 only after telling you to ignore the entire rest of the
21 chapter. The chapter starts on pages 193 and 194 with an event
22 that happened in 2004, after Mr. Sterling is gone. It ends its
23 discussion about Classified Program No. 1 with information
24 about the NSA tracking the person from Vienna going back to
25 Tehran. There's no evidence that anyone ever told Mr. Sterling

1 that. There's no reason he would have told Mr. Risen that.

2 The government's suspicion that because the book
3 talks in detail about things that Mr. Sterling knew simply is
4 not enough. The Hill knew what Mr. Sterling told them.
5 Mr. Risen had sources at the CIA.

6 They have a theory; I have a theory. I think my
7 theory is the more likely theory, but frankly, that doesn't
8 matter. We're not dealing in competing theories. We're
9 dealing in evidence, and it is the government's burden to put
10 on evidence beyond a reasonable doubt that it was Mr. Sterling.

11 You heard from any number of CIA, former/current CIA
12 people in this case, and Mr. Sterling himself spent years of
13 his life with the CIA. Why? Because all of these people want
14 to defend our national defense. Why? Because they believe in
15 a system where you are not convicted of extraordinarily serious
16 crimes because the government believes that you committed them.

17 You took an oath to decide this case only on the
18 evidence presented to you, not on theories. The evidence does
19 not prove beyond a reasonable doubt that Mr. Sterling committed
20 the offense charge -- the offenses charged.

21 Now, this is my last opportunity to speak to you.
22 The government gets to get up, they get to go last. They get
23 the last word, and that's appropriate. It is the government's
24 burden to prove the case, and the burden is a high one.
25 Indeed, in this case, it is an insurmountable one.

1 The government has great lawyers. One of them is
2 going to get up now, and they're going to think of an argument
3 that I have not thought of. They're going to discuss a piece
4 of evidence that I didn't mention or I didn't discuss
5 thoroughly enough. They're going to make a compelling
6 argument.

7 Yes, the government is allowed to use circumstantial
8 evidence, and there may be cases where guilt can be established
9 beyond a reasonable doubt based on circumstantial evidence, but
10 this is not one of those cases. Be very careful. It's
11 dangerous.

12 Can you put up Exhibit 146?

13 THE COURT: You've got one more minute.

14 MR. POLLACK: Thank you, Your Honor.

15 Can you blow it up? Yeah, blow that up.

16 The government offered this to you as circumstantial
17 evidence that Mr. Sterling had a classified document on his
18 computer pertaining to Classified Program No. 1, circumstantial
19 evidence that he provided that information to Mr. Risen.

20 Ladies and gentlemen, it would have been a tragedy if
21 we had not found Mr. Gilby or if he had not remembered that he
22 had used a software called Merlin. You would have convicted
23 Jeffrey Sterling of grave charges because Mr. Gilby researched
24 scheduling software for use in his business renovating homes.

25 When you get back to the jury room, before you begin

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1 your deliberations in earnest, please think carefully about how
2 I would have responded to the government's final arguments had
3 I been given the chance. Look at the evidence carefully, and
4 make my arguments for me. You'll make them better than I can.
5 And Mr. Sterling deserves that.

6 Then and only then begin deliberating, and when you
7 are done, do the only thing that you can do on the evidence
8 that has been presented: Find Mr. Sterling not guilty of each
9 and every count.

10 Thank you.

11 THE COURT: All right, Mr. Trump, you have ten
12 minutes.

13 MR. TRUMP: May we approach, Your Honor?

14 THE COURT: Yes.

15 (Bench conference on the record.)

16 THE COURT: Mr. Trump? Yes.

17 MR. TRUMP: I just want to make sure that I don't
18 step over the line should I make this argument, but counsel
19 suggested that there was some sort of conspiracy within the CIA
20 to kill this story, to feed documents to Jim Risen tasking
21 Bob S. to write a report after the fact to feed to Risen.

22 Obviously, Judge, if there had been any such
23 conspiracy, if anybody had actually done that, if there were
24 documents, we were legally obligated to produce that to the
25 defense.

1 MR. POLLACK: If you have them.

2 MR. TRUMP: And we didn't, and the CIA was legally
3 obligated to provide them to us. There is no such documents.
4 There is no such evidence.

5 THE COURT: Well, you need to be careful from my past
6 experience in these cases. You're not aware of any such
7 evidence. You don't want to put yourself in the -- you can't
8 testify, if that's what your concern was about, about that. I
9 think you don't want to make that argument.

10 MR. TRUMP: Okay. I just want to make sure I don't
11 go too far, Your Honor.

12 THE COURT: I don't think you want to make that
13 argument.

14 MR. TRUMP: Okay.

15 (End of bench conference.)

16 MR. TRUMP: May I consult with cocounsel for one
17 minute?

18 THE COURT: Yes.

19 It's always a bad sign when a lawyer pours a glass of
20 water.

21 (Laughter.)

22 THE COURT: We used to have a colleague here who
23 wouldn't let the lawyers have water. It made the trials go
24 very quickly.

25 (Laughter.)

1 THE COURT: All right, Mr. Trump, are you ready?

2 REBUTTAL ARGUMENT

3 BY MR. TRUMP:

4 Good afternoon.

5 Sorry, Your Honor, something doesn't seem to be -- I
6 only have a few minutes, so I'll just address a few points.
7 Don't overlook the obvious. Don't get lost in conjecture and
8 speculation and possibilities and probabilities.

9 Circumstantial evidence can be compelling. It can be
10 powerful. It can be sufficient to convict. If you look
11 outside and you see that it's wet, you know it rained. You
12 don't have to see the rain to know it's true.

13 Counsel just went through a scenario for which there
14 is absolutely no evidence whatsoever. The idea that Jim Risen
15 had a source somewhere on Capitol Hill, that somehow someone
16 from SSCI talked to James Risen, there's no evidence that that
17 happened. There's no evidence that then he called Bill Harlow
18 and there was some sort of conspiracy, some sort of group
19 effort by the CIA to feed him documents in an effort to kill
20 the story, that they enlisted Merlin, they enlisted Bob S.,
21 that they asked Bob S. to write after-the-fact reports which
22 they could then feed to Mr. Risen to support an effort to kill
23 the story. There's absolutely no evidence whatsoever that that
24 ever happened.

25 The evidence is that Risen called Harlow, that there

1 was a meeting at the White House. That was the interaction
2 between the CIA and James Risen in April about this story.

3 The idea that Risen was able to write this chapter of
4 this book based on other sources, on other information, without
5 the defendant, without the help of the defendant, the one who
6 had a motive, the one who said he was going to come after the
7 CIA, the one who had an ongoing --

8 MR. POLLACK: Your Honor, I'm sorry, I have to
9 object. That statement is not even coming in for the truth.
10 He can't argue it.

11 THE COURT: The jury's recollection of the evidence
12 is what will govern them in their deliberations. If counsel
13 have misstated the evidence, the jury will remember that.

14 Go ahead, Mr. Trump.

15 MR. TRUMP: The one who had an ongoing relationship
16 with Risen since 2001, a relationship that abruptly ends with
17 the publication of the book in 2006, who was the case officer
18 assigned to this operation during the relevant time frame, who
19 was a participant and knowledgeable, who did have access while
20 he worked at the CIA to all of the cables that Bob had access
21 as well, as well as all the other case officers, who is the
22 only person who had knowledge of every fact known to Risen,
23 from the true name of the asset to his \$5,000 salary, to the
24 technical and logistical aspects of the operation, who had
25 received a copy of the letter quoted in the book from Merlin a

1 week or two prior to the Vienna trip.

2 Now, counsel can say that it didn't happen, but the
3 only evidence in the record is that Merlin said he gave a copy
4 of that letter to the defendant, who, like Risen, did not know
5 about the ongoing operations, and even though, yes, Mr. Risen
6 said that it was an ongoing program, but when he actually wrote
7 the book, he didn't. He wrote it in the time frame of Jeffrey
8 Sterling.

9 The 2000 PAR, there is absolutely no way, and you
10 will have it in evidence, there is no way without the defendant
11 telling Risen that this PAR relates to Merlin and this
12 operation, that he would be able to figure that out on his own.
13 Look at it.

14 He's the only person who said, falsely, that the
15 operation may have given nuclear secrets to the Iranians. And
16 why did he wait five years? Because at this point in time, he
17 had lost all hope of a financial settlement with the agency.
18 It was done.

19 Now, yes, he had ongoing litigation with respect to
20 the PRB, but the prospect of getting money was done. It was
21 over.

22 And as of March 10, 2003, he sent Risen an e-mail
23 about the CNN article, just five days after his trip to SSCI.
24 Now, you saw a comparison of the Harlow memo and the Stone
25 memo, and yes, there's similar information in there because the

1 information comes from the same source. It comes from Jeffrey
2 Sterling to SSCI, it comes from Jeffrey Sterling to James
3 Risen, but Risen had more detailed information. He had, he had
4 talked with the defendant. By this time, he's getting more and
5 more information. He's preparing to write the article.

6 And again, look at the phone calls. Look at the
7 phone records. There's a whole cluster of records indicating
8 continuing contact in March and April between the defendant and
9 James Risen.

10 The other suspects. Merlin. There is absolutely no
11 evidence whatsoever that Merlin had any sort of relationship
12 with James Risen, none. No motive whatsoever. None. It
13 ruined his relationship with the CIA. He lost his job
14 essentially. There is absolutely no evidence in this record to
15 suggest that Merlin had any contact whatsoever with James
16 Risen, that he was tasked by the CIA with Bob to try to kill
17 the story. Nothing.

18 Merlin never knew about the deeply embedded flaws.
19 They kept that from him. He didn't know about the Red Team
20 efforts. That was information that was never provided to him.
21 He doesn't know anything about the PAR. He doesn't know
22 anything about the SSCI meeting.

23 The note? There was a discussion of a handwritten
24 note. In fact, it was something that was raised by the
25 defendant as an additional suggestion to the cover letter. It

1 was raised, it was discussed in the cable that the defendant
2 had brought up having two notes, two documents, one a
3 typewritten letter addressed to the official that he had
4 engaged with in terms of the e-mails, and then a note on the
5 top -- on the outside of the package to the person in Vienna so
6 that they could get in touch. It was something that was
7 actually suggested by the defendant.

8 The quotes, we don't know how it was that Risen
9 purportedly quotes a report of Merlin's trip to Vienna. Bob S.
10 testified he had never seen such a report. Merlin said he did
11 not prepare a written report. When asked about the passage in
12 the book by the defense counsel, Merlin stated, "Well, maybe
13 the defendant secretly taped me; I don't know."

14 Plausible? Perhaps. More plausible than Bob S.
15 getting tasked to write an after-the-fact document by the CIA
16 in order to feed it to James Risen in order to kill the story.

17 Again, Bob S., as my cocounsel explained, this was
18 his baby. He is not going to leak the information to James
19 Risen. This is ten years of his life.

20 And again, there's absolutely no evidence that he had
21 any sort of relationship with James Risen. He had no knowledge
22 of the defendant's PAR, no knowledge of the SSCI meeting.

23 How do the details get into the book about Vienna?
24 James Risen went to Vienna. He walked those streets. He
25 looked at those streetcars. He went to that building. He saw

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1 the same things that Merlin saw. That's how it gets up -- ends
2 up in the book.

3 And what's interesting is that defense counsel pulls
4 information from interviews, from testimony, from facts in the
5 record. You should believe Vicki Divoll when she says this.
6 You should believe Don Stone when he says this. You should
7 believe Bob when he talks about fire set or firing set. You
8 should believe Merlin when he says this because it fits into
9 his narrative.

10 But when they say they did not provide information to
11 James Risen, when they say they had no relationship with James
12 Risen, then don't believe them.

13 Phone calls and the e-mail. Counsel came up with a
14 story to try to explain the series of phone calls and e-mails
15 from 2003 through 2005. Look carefully at each of the clusters
16 of communications between the defendant and Risen.

17 There's a group of communications in March and April
18 of 2003. What is happening at that point? James Risen is
19 going to the CIA. He says he has a story; it's nearly
20 complete; he's ready to publish.

21 There's a second cluster, primarily in
22 April-May-June, mostly June. Right before what happens? Risen
23 submits a book proposal to Simon & Schuster.

24 Look at the June 10, June 11, June 13 series of
25 events, the Federal Express, and then four calls at the end of,

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1 end of June. And then what happens? Very little activity for
2 a long period.

3 Then another cluster of calls in August of 2005 and
4 then in November of 2005, and what is happening at that point?
5 Final touches to the book, which is then published and released
6 in 2006.

7 This case is not about politics. It's not about
8 salvaging the reputation of the CIA. What happened here was a
9 big deal. Nuclear weapons, the capabilities of our
10 adversaries, that's a big deal. The compromise of this
11 operation, this asset, ruining ten years of work under two
12 different administrations, wasting millions of dollars, giving
13 away our secrets, our strategic advantages, endangering the
14 lives of an asset, his family, that all is a big deal.

15 THE COURT: One minute.

16 MR. TRUMP: You were given a very rare, a very unique
17 glimpse into the lives of those who work for the CIA. You
18 heard from case officers who toil for years in the shadows.
19 I'm sure they find their work rewarding, fascinating at times,
20 but it comes with a heavy, heavy price: no public accolades,
21 no discussion with friends and family, sometimes not even with
22 their colleagues. And they must forever, forever keep their
23 country's secrets. That's their solemn promise.

24 But they serve, and we rest easier as a result.
25 Sometimes they stand in harm's way so that we don't have to.

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1 They are true patriots.

2 On April 5, 1999, Merlin and the defendant met,
3 Exhibit 24. At that meeting, Merlin asked the defendant what
4 would happen if his work for CIA would ever get exposed? The
5 defendant assured him he should not worry, that will never
6 happen.

7 Jeffrey Sterling could not keep his promises.

8 Jeffrey Sterling betrayed his country. He betrayed the CIA.
9 He betrayed his colleagues. He betrayed Merlin. Jeffrey
10 Sterling is not a patriot. He is the defendant, and he is
11 guilty.

12 THE COURT: All right, ladies and gentlemen, you've
13 now heard all of the closing arguments. Again, the case is by
14 no means finished because you have not gotten the instructions
15 from the Court. So I want you to now take your lunch break,
16 I'll ask you to be back here approximately 25 after, and then
17 you'll get the instructions.

18 Please do not begin any deliberations, and continue
19 to follow my cautions about not interacting with anything
20 outside of the courtroom that could possibly taint your thought
21 process, and we'll see everybody back here at 25 after. Thank
22 you.

23 (Recess from 12:25 p.m., until 1:25 p.m.)

24

25

1 A F T E R N O O N S E S S I O N

2 (Defendant present, Jury out.)

3 THE COURT: All right, before we bring in the jury,
4 again the ground rules are while the Court's instructing, no in
5 and out of the courtroom, so I assume that's going to be taken
6 care of.

7 We gave you over the lunch break, there are four jury
8 instructions that have been slightly changed, and there's a new
9 one. Let me take 11(a), the classification markings had been
10 submitted by the government, I think, earlier, but I needed
11 also -- and this comes from our court security people -- to
12 advise the jury as to how they must approach the three still
13 classified exhibits, so I want to know whether there's any
14 objection to the language. It's 11(a). It should be in the
15 small, independent package that each of you have, if there's
16 any objection to that additional language.

17 So what I've added there is, "Because Exhibits 142,
18 143, and 144 remain classified as Secret, you may not
19 communicate the contents of these exhibits to anyone after this
20 trial is concluded. You should draw no inference as to the
21 guilt or innocence of the defendant from the fact that you
22 cannot communicate anything about these exhibits."

23 Is there any objection to that?

24 MR. MAC MAHON: No objection from the defense, Your
25 Honor.

1 THE COURT: I assume --

2 MR. TRUMP: That's fine.

3 THE COURT: All right, good. All right, so that's
4 11(a) if you want to put it in your packet.

5 Then if you look at, we've made the modifications we
6 talked about to Exhibit -- to instruction page 24. We've added
7 the exhibit numbers 142 through 145. That's the 404(b)
8 evidence exhibit -- I'm sorry, instruction, and we in the last
9 paragraph struck out "or crimes." So "the defendant is not on
10 trial for any acts not alleged in the indictment," all right?

11 MR. MAC MAHON: Thank you, Your Honor.

12 THE COURT: No objection to that, correct?

13 Okay. Possession, which is 31, we have changed the
14 tense to the past tense in the paragraph for Counts 1, 4, and
15 6, so it says, "by a person who held an appropriate security
16 clearance and had a need to know at the time the person
17 acquired the classified information," and then we've added the
18 "namely, a letter related to Classified Program No. 1" in the
19 next paragraph.

20 Any problem with that new instruction?

21 MR. MAC MAHON: No, Your Honor.

22 THE COURT: All right? So make sure you replace that
23 in your packets.

24 And then the only change we made to 41, we had
25 intended to have the date so that the jury doesn't have to go

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1 back and forth rummaging through the instructions, so we've
2 just added the dates that were alleged in that count. All
3 right, any problem with that? No?

4 MR. MAC MAHON: Not from the defense, Your Honor.

5 THE COURT: All right, then I believe we are about
6 ready to bring the jury in. Are there any other last-minute
7 matters? Were all the exhibits taken care of at the close of
8 business yesterday? Was there any issue with any of the
9 physical exhibits?

10 MR. FITZPATRICK: No, Your Honor.

11 THE COURT: I'm sorry?

12 MR. FITZPATRICK: No, Your Honor.

13 THE COURT: No? Mr. Olshan?

14 MR. OLSHAN: As a housekeeping matter --

15 THE COURT: Yes, sir.

16 MR. OLSHAN: -- Exhibit 176 was a stipulation.

17 It's the last one we moved in. The exhibit that goes
18 to the jury just needs to be executed by the parties.

19 THE COURT: Let's do that right now. So let me have
20 176 pulled out of the stack. Do you have them?

21 MR. OLSHAN: We don't have the official evidence
22 binder.

23 THE CLERK: No, I have it.

24 MR. OLSHAN: May I approach?

25 THE COURT: Yes. So you -- have you signed it? Has

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1 anybody signed it?

2 MR. OLSHAN: I don't believe so.

3 THE COURT: All right. So just pull 176 out.

4 Mr. MacMahon, while that's being done, was there some
5 issue you had as well?

6 MR. MAC MAHON: No, Your Honor.

7 THE COURT: Okay.

8 MR. MAC MAHON: I'm just taking the chance to stand
9 up.

10 THE COURT: You can do that during, during the charge
11 if you want.

12 MR. MAC MAHON: I'll be fine, Your Honor. Thank you
13 very much.

14 THE COURT: I mean, frankly, you don't even have to
15 be here for the charge. You know what I'm going to say.

16 MR. MAC MAHON: I know, but I wouldn't do that, Your
17 Honor.

18 THE COURT: All right, that's fine.

19 MR. OLSHAN: One moment, Your Honor?

20 THE COURT: Yes, sir.

21 MR. OLSHAN: We need to grab a copy of that one.

22 It's just a stipulation. It shouldn't be an issue. If it's
23 easier to --

24 THE COURT: I'm sorry? You need a copy?

25 MR. OLSHAN: The formal exhibit binder does not have

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1 a version of it, have the exhibit. If the defense has a copy,
2 we can just sign it.

3 MR. MAC MAHON: We'll see if we have one.

4 THE COURT: All right. Did you-all do your indexes
5 of the exhibits?

6 MR. OLSHAN: Yes.

7 THE COURT: You're looking over your shoulder,
8 Mr. Olshan. Is it in the courthouse -- courtroom?

9 MR. FRANCISCO: Yes.

10 THE COURT: We have it?

11 Did you show it to defense counsel? Is there any
12 objection to the form of the index? I usually have defense
13 counsel actually initial it just to make sure there's no
14 argument that there's something that was said in the index that
15 could be an issue.

16 All right, so 176 is fully endorsed now? It's all
17 set.

18 MR. OLSHAN: Thank you, Your Honor.

19 THE COURT: All right. And the -- again, the index,
20 no objections to the index? Are you still looking at that,
21 Mr. Pollack?

22 MR. POLLACK: Your Honor, if I can have just a
23 minute?

24 THE COURT: All right. And the defense list is so
25 short, I'm assuming there's no objection to -- we don't have a

1 defense index. Do you have one?

2 MS. HAESSLY: Yes, we have one, Your Honor.

3 THE COURT: All right. Hold on.

4 Ms. Copsey, would you go get that?

5 All right, any objection, Mr. Trump?

6 MR. TRUMP: No.

7 THE COURT: All right, that's fine. So the defense
8 list is in.

9 Well, I'll tell you what, I want to start charging
10 the jury. Mr. Pollack, you can be looking at that at the same
11 time. If there's an objection, we still haven't sent it in to
12 the jury, and we can correct that afterwards, all right?

13 MR. POLLACK: Yes. There are a couple of issues, but
14 we can take them up later.

15 THE COURT: All right. Mr. Wood, let's bring the
16 jury in.

17 (Jury present.)

18 THE COURT: Have a seat, ladies and gentlemen. Thank
19 you.

20 All right, now that you have heard all of the
21 evidence to be received in this trial and each of the arguments
22 of counsel, it becomes my duty to give you the final
23 instructions of the Court as to the law that is applicable to
24 this case and which will guide you in your decisions.

25 All of the instructions of law given to you by the

1 Court -- those given to you at the beginning of the trial,
2 those given to you during the trial, and these final
3 instructions -- must guide and govern your deliberations.

4 It is your duty as jurors to follow the law as stated
5 in all of the instructions of the Court and to apply these
6 rules of law to the facts as you find them from the evidence
7 received during the trial.

8 Counsel have quite properly referred to some of the
9 applicable rules of law to you in their closing arguments. If,
10 however, any difference appears to you between the law as
11 stated by counsel and that as stated by the Court in these
12 instructions, you are, of course, to be governed by the
13 instructions given to you by the Court.

14 You are not to single out any one instruction alone
15 as stating the law but must consider all of the instructions as
16 a whole in reaching your decisions.

17 Neither are you to be concerned with the wisdom of
18 any rule of law stated by the Court. Regardless of any opinion
19 you may have as to what the law ought to be, it would be a
20 violation of your sworn duty to base any part of your verdict
21 upon any other view or opinion of the law than that given in
22 these instructions of the Court, just as it would be a
23 violation of your sworn duty as judges of the facts to base
24 your verdict upon anything but the evidence received in the
25 case.

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1 You were chosen as jurors for this trial in order to
2 evaluate all of the evidence received and to decide each of the
3 factual questions presented by the allegations brought by the
4 government in the indictment and the pleas of not guilty of the
5 defendant.

6 In deciding the issues presented to you for decision
7 in this trial, you must not be persuaded by bias, prejudice, or
8 sympathy for or against any of the parties to this case or by
9 any public opinion.

10 Justice through trial by jury depends upon the
11 willingness of each individual juror to seek the truth from the
12 same evidence presented to all of the jurors here in the
13 courtroom and to arrive at a verdict by applying the same rules
14 of law as are now being given to each of you in these
15 instructions.

16 During this trial, I permitted you to take notes. As
17 I advised you at the beginning of the trial, many courts do not
18 permit note taking by jurors. You are instructed that your
19 notes are only a tool to aid your own individual memory, and
20 you should not compare your notes with those of other jurors in
21 determining the content of any testimony or in evaluating the
22 importance of any evidence.

23 Moreover, you are 12 coequal judges of the facts.
24 The memory or opinions about the evidence of a juror who took
25 extensive notes is no more or less deserving of consideration

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1 than the memory or opinions about the evidence held by a juror
2 who took few or no notes. Your notes are not evidence and are
3 by no means a complete outline of the proceedings or even a
4 list of the highlights of the trial. Above all, your memory
5 should be your greatest asset when it comes time to deliberate
6 and render a decision in this case.

7 Now, the evidence in this case consists of the sworn
8 testimony of the witnesses, regardless of who may have called
9 them, all exhibits received in evidence, regardless of who may
10 have produced them, and all stipulations of fact agreed to by
11 the parties.

12 Any proposed testimony or proposed exhibit to which
13 an objection was sustained by the Court and any testimony or
14 exhibit ordered stricken by the Court must be entirely
15 disregarded. Anything you may have seen or heard outside the
16 courtroom is not proper evidence and must be entirely
17 disregarded.

18 Questions of the lawyers are not evidence. Only a
19 witness's answer to a question is evidence. Objections,
20 statements, and arguments of counsel are not evidence in the
21 case.

22 You are to base your verdict only on the evidence
23 received during the trial. In your consideration of the
24 evidence received, however, you are not limited to the literal
25 statements of the witnesses or to the literal assertions in the

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1 exhibits. In other words, you are not limited solely to what
2 you see and hear as the witnesses testify or as the exhibits
3 are admitted. Instead, you are permitted to draw from the
4 testimony and exhibits which you find reliable such reasonable
5 inferences as you find justified in the light of your
6 experience and common sense. Inferences are simply conclusions
7 which can reasonably be drawn from the evidence received during
8 the trial.

9 There is nothing particularly different in the way
10 that a juror should consider the evidence in a trial from that
11 in which any reasonable and careful person would treat any very
12 important question that must be resolved by examining facts,
13 opinions, and evidence. You are expected to use your good
14 sense in considering and evaluating the evidence in the case
15 for only those purposes for which it has been received and to
16 give such evidence a reasonable and fair construction in the
17 light of your common knowledge of the natural tendencies and
18 inclinations of human beings.

19 If any reference to a witness's testimony or the
20 exhibits either by the Court or by counsel does not coincide
21 with your own memory of the evidence, it is your memory of the
22 evidence which controls during your deliberations and not that
23 of the Court or of counsel.

24 It is the duty of the Court to admonish an attorney
25 who out of zeal for his or her cause does something which I

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1 feel is not in keeping with the rules of evidence or procedure.
2 You are to draw absolutely no inference against the side to
3 whom an admonition of the Court may have been addressed during
4 the trial of this case.

5 And during the course of the trial, I occasionally
6 asked questions of a witness. Do not assume that I hold any
7 opinion on the matters to which my questions may relate. The
8 Court may ask a question simply to clarify a matter, not to
9 help one side of the case or hurt the other side.

10 It is the sworn duty of an attorney on each side of a
11 case to object when the other side offers testimony or exhibits
12 which that attorney believes is not entirely admissible -- or
13 properly admissible. Only by raising an objection can a lawyer
14 request and obtain a ruling from the Court on the admissibility
15 of the evidence being offered by the other side. You should
16 not be influenced against an attorney or the attorney's client
17 because the attorney has made objections.

18 Moreover, do not attempt to interpret my rulings on
19 objections as somehow indicating to you who I believe should
20 win or lose the case.

21 Now, I'm going to talk in these next set of
22 instructions a little bit about evidence. There are two types
23 of evidence which are generally presented during a trial --
24 direct evidence and circumstantial evidence. Direct evidence
25 is the testimony of a person who asserts or claims to have

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1 actual knowledge of a fact, such as an eyewitness.

2 Circumstantial evidence is proof of a chain of facts and
3 circumstances indicating the existence of a fact.

4 And I have a standard example I always give to juries
5 about circumstantial evidence. You leave your home one morning
6 in, let's say it's February. It's been cold out, but your
7 front yard is bare. There's no snow on the ground. And you
8 leave, let's say, at 9:00 in the morning, and you come home at
9 1:00 in the afternoon.

10 Now, in the meantime, it has snowed, and when you
11 come home at 1:00, there's a white blanket of snow in your
12 front yard, and you see a footprint in that snow. You do not
13 see a person, but you see the facts -- you have the facts I've
14 just given you.

15 Now, you have direct evidence that it has snowed.
16 You know what time you left the house, you know what time
17 you've come back, you see the footprint, and you know from
18 ordinary human experience a human being normally is associated
19 with a footprint.

20 From those facts, you can draw the inference that
21 there was a person in your yard sometime between nine and one,
22 although you never saw the person. That's an example of
23 circumstantial evidence.

24 Now, the law makes absolutely no distinction between
25 the weight or value to be given to either direct or

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1 circumstantial evidence, nor is a greater degree of certainty
2 required of circumstantial evidence than of direct evidence.
3 In other words, you should weigh all the evidence in the case
4 in reaching your verdict.

5 During this trial, documents have been entered into
6 evidence that have had words and phrases and sometimes entire
7 paragraphs redacted or deleted. In other instances, you have
8 seen that there have been words or phrases substituted for the
9 original words or phrases that may appear in a document.

10 I have decided to allow substitutions and redactions
11 in this fashion to protect national security interests. Many
12 of the substitutions and redactions pertain to names and
13 specific locations, and those specific names themselves are
14 simply not relevant to the issues at hand. Sometimes I have
15 permitted substitutions and redactions to protect sensitive and
16 highly classified matters, most of which have nothing to do
17 with this case.

18 I caution you that you should not consider the manner
19 in which substitutions and redactions have been used as an
20 expression of my opinion regarding the facts of this case. It
21 is your job and your job alone to decide the facts of this
22 case.

23 A number of the exhibits received in evidence contain
24 their original classification markings, such as Secret. Except
25 for Exhibits 142, 143, and 144, which I will address shortly,

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1 all of these exhibits are now unclassified. These unclassified
2 exhibits are public, are public record documents and do not
3 require any special handling procedures.

4 Because Exhibits 142, 143, and 144 remain classified
5 as Secret, and you're going to know that because they have a
6 red cover on them when you see them in the jury room, you may
7 not communicate the contents of these exhibits to anyone after
8 this trial is concluded. You should draw no inference as to
9 the guilt or innocence of the defendant from the fact that you
10 cannot communicate anything about these exhibits.

11 Now, certain charts and summaries have been shown to
12 you in order to help explain the facts disclosed by the books,
13 records, and other documents which are in evidence in the case.
14 Such charts or summaries are not in and of themselves evidence
15 or proof of any facts. If such charts or summaries do not
16 correctly reflect the facts or figures shown by the evidence in
17 the case, you should disregard them.

18 In other words, such charts and summaries are used
19 only as a matter of convenience. So if, and to the extent that
20 you find they are not in truth summaries of facts or figures
21 shown by the evidence in the case, you are to disregard them
22 entirely.

23 The next group of instructions talk about witnesses
24 and how you go about approaching and evaluating witnesses, and
25 this next instruction also addresses evidence.

1 In evaluating the evidence, always consider the
2 quality of the evidence over the quantity. You are not bound
3 to decide any issue of fact in accordance with the testimony of
4 any number of witnesses which does not produce in your minds
5 belief in the likelihood of truth, as against the testimony of
6 a lesser number of witnesses or other evidence which does
7 produce such belief in your minds. In other words, the test is
8 not which side brings the greater number of witnesses or
9 presents the greater quantity of evidence but which witness and
10 which evidence appeals to your minds as being most accurate and
11 otherwise trustworthy.

12 The testimony of one witness or just a few witnesses
13 in whom you have complete confidence may outweigh the testimony
14 of several witnesses in whom you do not have such confidence.
15 Similarly, one or two exhibits which you find compelling may
16 outweigh numerous exhibits which you find less compelling. So
17 it is the quality of the evidence, not the quantity of the
18 evidence, that you should be concerned with.

19 Now, you as jurors are the sole and exclusive judges
20 of the credibility of each of the witnesses called to testify.
21 Only you determine -- excuse me -- only you determine the
22 importance or the weight that their testimony deserves. After
23 evaluating the credibility of a witness, you may decide to
24 believe all of that witness's testimony, only a portion of it,
25 or none of it at all.

1 In evaluating a witness's credibility, you should
2 carefully consider all of the testimony given, the
3 circumstances under which each witness has testified, and every
4 matter in evidence which tends to show whether a witness in
5 your opinion is worthy of belief. Consider each witness's
6 intelligence, motive to falsify, state of mind, and appearance
7 and manner while on the witness stand. Consider the witness's
8 ability to observe the matters as to which he or she has
9 testified, and consider whether the witness impresses you as
10 having an accurate memory or recollection of these matters.
11 Consider also any relation a witness may bear to either side of
12 the case, the manner in which each witness might be affected by
13 your verdict, and the extent to which, if at all, each witness
14 is either supported or contradicted by other evidence in the
15 case.

16 Inconsistencies or discrepancies in the testimony of
17 a witness or between the testimony of different witnesses may
18 or may not cause you to disbelieve or discredit such testimony.
19 Two or more persons witnessing an incident may simply see or
20 hear it differently. Innocent mistakes in remembering
21 something is not an uncommon human experience. In evaluating
22 the effect of a discrepancy, however, always consider whether
23 it pertains to a matter of importance or to an insignificant
24 detail, and consider whether the discrepancy results from
25 innocent error or from intentional falsehood.

1 After making your own judgment concerning the
2 believability of a witness, you can then attach such importance
3 or weight to that testimony, if any, that you feel it deserves.

4 The rules of evidence ordinarily do not permit
5 witnesses to testify as to opinions or conclusions. An
6 exception to this rule exists as to those whom we call expert
7 witnesses. Witnesses who by education and experience have
8 become expert in some art, science, profession, or calling may
9 state their opinions as to relevant and material matters in
10 which they profess to be expert and may also state their
11 reasons for the opinions.

12 You should consider each expert opinion received in
13 evidence and give it such weight as you think it deserves. If
14 you should decide that the opinion of an expert witness is not
15 based upon sufficient education and experience or if you should
16 conclude that the reason given in support of the opinion --
17 reasons given in support of the opinion are not sound, or if
18 you feel that it is outweighed by other evidence, you may
19 disregard the opinion entirely.

20 A witness may be discredited -- and the technical
21 term is "impeached" -- by contradictory evidence or by evidence
22 that at some other time, the witness has said or done something
23 or has failed to say or do something that is inconsistent with
24 the witness's present testimony.

25 If you believe any witness has been impeached and

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1 thus discredited, it is your exclusive province to give the
2 testimony of that witness such credibility, if any, as you may
3 think it deserves.

4 If a witness is shown knowingly to have testified
5 falsely concerning any material matter, you have a right to
6 distrust such witness's testimony in other particulars, and you
7 may reject all the testimony of that witness or give it such
8 credibility as you may think it deserves.

9 An act or omission is knowingly done if voluntarily
10 and intentionally done and not done because of a mistake or
11 accident or other innocent reason.

12 Now, during the trial of this case, the testimony of
13 Mr. Merlin was presented to you by way of video deposition
14 which consisted of sworn recorded answers to questions asked of
15 the witness in advance of the trial by the attorneys for the
16 parties to the case. The testimony of a witness who for some
17 reason cannot be present to testify from the witness stand may
18 be presented through a video recording played on a television
19 set. Such testimony is entitled to the same consideration and
20 is to be judged as to credibility and weighed and otherwise
21 considered by the jury insofar as possible in the same way as
22 if the witness had been physically present in the courtroom and
23 had testified from the witness stand.

24 During this trial, you heard testimony from witnesses
25 who are currently employed by the Central Intelligence Agency.

1 You also heard testimony from former employees of the Central
2 Intelligence Agency, some of whom continue to work for the
3 agency as contractors, and you heard the testimony of Human
4 Asset No. 1 by video deposition and that of his wife. These
5 witnesses testified either by using only initials or using a
6 made-up name -- Merlin, that's a made-up name -- if you were
7 not told their true names. These witnesses also testified with
8 a screen preventing the general public from seeing them.

9 The disclosure of the witnesses' names and their
10 physical identity could potentially compromise either their
11 continued work for the CIA or expose them to safety issues.

12 As I have explained to you, one of your roles as
13 jurors will be to assess the credibility of each witness who
14 has testified during this trial. You should not make any
15 judgments about the credibility of those witnesses simply
16 because you do not know their full names or because they
17 testified with the screen. Moreover, you should not consider
18 the manner in which such witnesses testified as an expression
19 of my opinion as to any of the facts of this case. Again, it
20 is your job and your job alone to decide the facts of this
21 case.

22 The defendant in a criminal case has an absolute
23 right under our Constitution not to testify. The fact that the
24 defendant, Jeffrey Alexander Sterling, did not testify must not
25 be discussed or considered by the jury in any way when

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1 deliberating and in arriving at your verdict. No inference of
2 any kind may be drawn from the fact that a defendant decided to
3 exercise his privilege under the Constitution and did not
4 testify.

5 As I stated earlier, the law never imposes upon a
6 defendant in a criminal case the burden or duty of calling any
7 witnesses or of producing any evidence.

8 Now, the next series of instructions are going to
9 talk about the indictment, which is the document used to bring
10 the charges, and then the specific charges involved in this
11 case, and we'll also be giving you some definitions of some of
12 the terms that are involved in those charges.

13 An indictment is a formal method used by the
14 government to accuse a person of a crime. It is not evidence
15 of any kind against a person. Mr. Sterling is presumed to be
16 innocent of the crimes charged. Even though the indictment has
17 been returned against Mr. Sterling, he begins this trial with
18 absolutely no evidence against him.

19 Mr. Sterling has pleaded not guilty to all the
20 charges in this indictment and therefore denies that he is
21 guilty of the charges.

22 A separate crime is alleged against the defendant in
23 each count of the indictment. Each alleged offense and any
24 evidence pertaining to it should be considered separately by
25 the jury. The fact that you find the defendant guilty or not

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1 guilty of one of the offenses charged should not control your
2 verdict as to any other offense charged against the defendant.

3 In other words, you must give separate and individual
4 consideration to each charge against the defendant.

5 The indictment charges that the alleged offenses were
6 committed between on or about certain dates. Although it is
7 necessary for the government to prove beyond a reasonable doubt
8 that each offense was committed on a date reasonably near the
9 date or dates alleged in the specific count being considered,
10 it is not necessary for the government to prove that each
11 offense was committed precisely on the dates charged.

12 The defendant is not on trial for any act or any
13 conduct not specifically charged in the indictment.

14 Now, the government has introduced evidence that
15 defendant had classified documents, and these are Exhibits 142
16 through 145, in his custody when his residence was searched.
17 Evidence that an act was done by the defendant at some other
18 time is not, of course, any evidence or proof whatever that at
19 another time, the defendant performed a similar act, including
20 the offenses charged in this indictment.

21 Evidence of a similar act may not be considered by
22 the jury in determining whether the defendant actually
23 performed the physical acts charged in this indictment. Nor
24 may such evidence be considered for any other purpose
25 whatsoever unless the jury first finds beyond a reasonable

1 doubt from other evidence in the case standing alone that the
2 defendant did the acts charged in the indictment.

3 If the jury should find beyond a reasonable doubt
4 from other evidence in the case that the defendant did the act
5 or acts alleged in the particular count under consideration,
6 the jury may then consider evidence as to an alleged earlier
7 act of a like nature in determining the state of mind or intent
8 with which the defendant actually did the act or acts charged
9 in that particular count.

10 As previously stated, the defendant is not on trial
11 for any acts not alleged in the indictment. Nor may a
12 defendant be convicted of the crimes charged even if you were
13 to find that he committed other acts, even acts similar to the
14 one charged in this indictment.

15 Now, the defendant has been charged in the indictment
16 with knowingly and willfully communicating national defense
17 information to another not entitled to receive such information
18 while being in lawful possession of such information. Count 1
19 charges specifically that the defendant caused national defense
20 information, namely, information about Classified Program No. 1
21 and Human Asset No. 1, to be communicated, delivered, and
22 transmitted to any person of the general public not entitled to
23 receive this information, including foreign adversaries,
24 through the publication, distribution, and delivery of *State of*
25 *War* into the Eastern District of Virginia in approximately late

1 December and early January of 2006.

2 It's further alleged in Count 1 that the defendant
3 did so while having reason to believe that this national
4 defense information could be used to the injury of the United
5 States or to the advantage of any foreign nation.

6 Count 4 charges that the defendant communicated,
7 delivered, and transmitted national defense information,
8 namely, information about Classified Program No. 1 and Human
9 Asset No. 1, directly and indirectly to James Risen, a person
10 of the general public not entitled to receive this information,
11 between February 12 and April 30 of 2003. It's further alleged
12 that the defendant did so while having reason to believe that
13 this national defense information could be used to the injury
14 of the United States or to the advantage of any foreign nation.

15 Finally, Count 6 charges that the defendant attempted
16 to communicate, deliver, and transmit national defense
17 information, namely, information about Classified Program No. 1
18 and Human Asset No. 1, to any person of the general public not
19 entitled to receive this information, including foreign
20 adversaries, through the publication, distribution, and
21 delivery of a *New York Times* article in the Eastern District of
22 Virginia between February 27, 2003, and April 30, 2003. And
23 it's further alleged that the defendant did so while having
24 reason to believe that this national defense information could
25 be used to the injury of the United States or to the advantage

1 of any foreign nation.

2 Now, the statute defining the offenses charged -- the
3 offense charged in Counts 1, 4, and 6 is Title 18 of the United
4 States Code, Section 793(d), and that code provides in part:

5 Whoever, lawfully having possession of, access to,
6 control over, or being entrusted with any document,
7 writing, . . . , or note relating to the national defense, or
8 information relating to the national defense which information
9 the possessor has reason to believe could be used to the injury
10 of the United States or to the advantage of any foreign nation,
11 willfully communicates, delivers, transmits, or causes to be
12 communicated, delivered, or transmitted . . . the same to any
13 person not entitled to receive it . . . shall be guilty of an
14 offense against the United States.

15 The defendant -- and I'm going to now talk about
16 Counts 2, 5, and 7. The defendant has been charged in the
17 indictment with knowingly and willfully disclosing -- I'm
18 sorry, communicating national defense information to another
19 not entitled to receive said information while not being in
20 lawful possession of this information.

21 Count 2 charges that the defendant caused national
22 defense information, namely, a letter relating to Classified
23 Program No. 1, to be communicated, delivered, and transmitted
24 to any person of the general public not entitled to receive
25 this information, including foreign adversaries, through the

1 publication, distribution, and delivery of *State of War* into
2 the Eastern District of Virginia in approximately late December
3 and early January 2006. The defendant did so while having
4 reason to believe that this national defense information -- I'm
5 sorry, it's alleged that the defendant did so while having
6 reason to believe that this national defense information could
7 be used to the injury of the United States or to the advantage
8 of any foreign nation.

9 Count 5 charges that the defendant communicated,
10 delivered, and transmitted national defense information,
11 namely, a letter relating to Classified Program No. 1, directly
12 and indirectly to James Risen, a person of the general public
13 not entitled to receive this information, between February 12,
14 2003, and April 30, 2003. And it's further alleged that the
15 defendant did so while having reason to believe that this
16 national defense information could be used to the injury of the
17 United States or to the advantage of any foreign nation.

18 Finally, Count 7 charges that the defendant attempted
19 to communicate, deliver, and transmit national defense
20 information, namely, a letter about Classified Program No. 1,
21 to any person of the general public not entitled to receive
22 this information, including foreign adversaries, through the
23 publication, distribution, and delivery of a *New York Times*
24 article in the Eastern District of Virginia between February 27
25 and April 30 of 2003. And it's further alleged that the

1 defendant did so while having reason to believe that this
2 national defense information could be used to the injury of the
3 United States or to the advantage of any foreign nation.

4 Now, Counts 2, 5, and 7 involve a different
5 subsection of Section 793 of Title 18 of the United States
6 Code, and (e) provides in relevant part that: Whoever,
7 unlawfully having possession of, access to, control over, or
8 being entrusted with any document, writing, . . . , or note
9 relating to the national defense, or information relating to
10 the national defense which information the possessor has reason
11 to believe could be used to the injury of the United States or
12 to the advantage of any foreign nation, willfully communicates,
13 delivers, transmits, or causes to be communicated, delivered,
14 or transmitted . . . the same to any person not entitled to
15 receive it . . . shall be guilty of an offense against the
16 United States.

17 Now, every crime has what are called elements. These
18 are actually the essential components of that crime, and in a
19 criminal case, in order for a person to be found guilty of a
20 particular crime, the government must produce enough evidence
21 to establish each and every element beyond a reasonable doubt.
22 So if you have a crime with four elements and you're satisfied
23 the government has proven three of those four elements beyond a
24 reasonable doubt but not the fourth element, the government has
25 not met its burden, and you would have to acquit the defendant

1 for that particular count.

2 So in order to meet its burden of proof on Counts 1,
3 2, and 4 through 7, that is, the counts I've just summarized
4 for you, the government must prove beyond a reasonable doubt
5 the following elements:

6 First, for Counts 1, 4, and 6, that the defendant
7 lawfully had possession of, access to, control over, or was
8 entrusted with intangible or oral information relating to the
9 national defense.

10 For Counts 2, 5, and 7, the first element is that the
11 defendant had unauthorized possession of, access to, control
12 over, or was entrusted with a document, writing, or note
13 relating to the national defense.

14 So the first element is different for Counts 1, 4,
15 and 6. It's one first element. There's a different first
16 element for Counts 2, 5, and 7. But the second, third, and
17 fourth elements for these offenses are the same.

18 The second element -- this applies then to all of
19 those counts -- is that the defendant had reason to believe
20 that this national defense information could be used to the
21 injury of the United States or to the advantage of any foreign
22 nation.

23 The third element that's common to all of those
24 counts is that the defendant willfully communicated, delivered,
25 transmitted, or caused to be communicated, delivered, or

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1 transmitted this national defense information.

2 And the fourth element common to all of those counts
3 is that the defendant did so to a person not entitled to
4 receive it. A person is not entitled to receive classified
5 information if he did not hold a security clearance or if he
6 holds a security clearance but has no need to know the
7 information.

8 Now, the word "possess" means to own or to exert
9 control over something. The word "possession" can take on
10 several different but related meanings.

11 The law recognizes two kinds of possession -- actual
12 possession and constructive possession. A person who knowingly
13 has direct physical control over a thing at a given time is in
14 actual possession of it. The example is I'm holding this blue
15 pen in my hand. I have actual, physical possession of this
16 blue pen.

17 Now, a person who although not in actual possession,
18 knowingly has both the power and intention at a given time to
19 exercise dominion or control over a thing, either directly or
20 through another person or persons, is said to have constructive
21 possession of it. My courtroom deputy, Ms. Guyton, sitting
22 right here, works for me. She's got the computer. If I direct
23 her to send an e-mail message to my secretary, I at that time
24 have constructive possession of that computer because I'm in
25 the position to control how it's being used.

1 Now, you may find that the element of possession as
2 that term is used in these instructions is present if you find
3 beyond a reasonable doubt that the defendant had actual or
4 constructive possession of the thing at issue.

5 For Counts 1, 4, and 6, I'm now going to define two
6 key terms: "lawful possession" and "unlawful possession,"
7 because that's what differentiates that first element for these
8 counts. So for Counts 1, 4, and 6, a person has lawful
9 possession of something if he is entitled to have it. In this
10 case, lawful possession of classified information means
11 possession of classified information by a person who held an
12 appropriate security clearance and had a need to know at the
13 time the person acquired the classified information.

14 For Counts 2, 5, and 7, a person has unauthorized
15 possession of something if he is not entitled to have it. In
16 this case, unauthorized possession of classified information,
17 namely, a letter related to Classified Program No. 1, means
18 possession of classified information by a person who does not
19 hold a security clearance or by a person who holds a security
20 clearance without the need to know, or by a person who holds a
21 security clearance, has a need to know, but removed the
22 classified information from the official premise without
23 authorization.

24 The term "need to know" means a determination made by
25 an authorized holder of classified information that a

1 prospective recipient requires access to specific classified
2 information in order to perform or assist in a lawful and
3 authorized government function.

4 For those first six counts, that is, for Counts 1, 2,
5 and 4 through 7, the term "information relating to the national
6 defense" broadly refers to all matters that directly or may
7 reasonably be connected with the national defense of the United
8 States against any of its enemies, including matters relating
9 to the nation's intelligence capabilities.

10 The term "national defense" is a generic concept of
11 broad connotation referring not only to military, naval, and
12 air establishments, but also to all related activities of
13 national defense preparedness. National defense information
14 can be oral or intangible information.

15 To prove that documents, writings, or intangible
16 information relate to the national defense, there are two
17 things that the government must prove. First, it must prove
18 that the disclosure of the material would be potentially
19 damaging to the United States or might be useful to an enemy of
20 the United States. Second, it must prove that the material is
21 closely held by the United States government.

22 The disclosure of the information relating to the
23 national defense need not cause actual damage or harm to the
24 United States. Instead, potential damage or harm to the United
25 States is sufficient to establish this prong of the essential

1 element.

2 In determining whether material is closely held, you
3 may consider whether it has been classified by appropriate
4 authorities and whether it remained classified on the date or
5 dates pertinent to the indictment. Where the indictment has
6 been made public by the United -- I'm sorry, where the
7 information has been made public by the United States
8 government and is found in sources lawfully available to the
9 general public, it does not relate to the national defense.
10 Similarly, where the sources of information are lawfully
11 available to the public and the United States government has
12 made no effort to guard such information, the information
13 itself does not relate to the national defense.

14 In deciding this issue, you should examine the
15 information and also consider the testimony of witnesses who
16 testified as to the content and significance of the information
17 and who described the purpose and the use to which the
18 information contained therein could be put.

19 During the trial, you may have heard the attorneys
20 refer to certain evidence or materials as classified
21 information or that certain information was classified.
22 Classified information is information that has been determined
23 pursuant to a system established by the Executive Branch to
24 require protection against unauthorized disclosure.

25 As I have previously instructed you, when considering

1 Counts 1, 2, and 4 through 7, you are to determine whether
2 certain information in this case was national defense
3 information. That is not the same as classified information.
4 However, you may consider the fact that information was
5 classified in determining whether the information at issue was
6 national defense information.

7 For Counts 1, 2, and 4 through 7, the phrase "with
8 reason to believe that it could be used to the injury of the
9 United States or to the advantage of a foreign nation" means
10 that the defendant knew facts from which he concluded or
11 reasonably should have concluded that the documents, writings,
12 or intangible information relating to the national defense
13 could be used for the prohibited purposes. In considering
14 whether or not the defendant acted with the intent or having
15 reason to believe that the material could be used to the injury
16 of the United States or to the advantage of a foreign country,
17 you may consider the nature of the documents or information
18 involved.

19 The government does not have to prove that the
20 documents or information could be used both to injure the
21 United States and to the advantage of a foreign country. The
22 statute reads in the alternative, so proof of either will
23 suffice.

24 If a defendant willfully causes an act to be done by
25 another, the defendant is responsible for those acts as though

1 he personally committed them. To establish that the defendant
2 caused an act to be done, the government must prove beyond a
3 reasonable doubt:

4 First, that another person performed the acts that
5 constituted the crime of unauthorized communication of national
6 defense information or committed an indispensable element of
7 that crime; and

8 Two, that the defendant willfully caused these acts
9 even though he did not personally commit these acts.

10 The government need not prove that the person who
11 performed the acts that constituted the crime of unauthorized
12 communication of national defense information did so with
13 criminal intent. That person may be an innocent intermediary
14 or pawn.

15 The defendant need not perform acts that constitute
16 the crime of unauthorized communication of national defense
17 information, be present when it was performed, or be aware of
18 the details of its execution to be guilty of causing an act to
19 be done by another. However, a general suspicion that a lawful
20 act may occur or that something criminal is happening is not
21 enough. Mere knowledge that the unauthorized communication of
22 national defense information is being committed without more is
23 also not sufficient to establish causing an act to be done
24 through another.

25 As I have instructed you, an act is done willfully if

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1 done voluntarily and intentionally with the intent that
2 something the law forbids be done, that is to say, with bad
3 purpose, either to disobey or disregard the law.

4 For Counts 1, 2, and 4 through 7, an act is done
5 willfully -- and I'm just going to repeat this because it comes
6 through all the instructions -- if it is done voluntarily and
7 intentionally and with the specific intent to do something the
8 law forbids, that is, with a purpose to disobey the law.

9 Now, for Counts 1, 2, and 4 through 7, the government
10 must prove beyond a reasonable doubt each and every element of
11 these offenses as I have explained them to you. The
12 government, however, does not have to prove that the defendant
13 was the only person who communicated the national defense
14 information alleged in the indictment. Your duty as jurors is
15 limited to determining whether the government has proved beyond
16 a reasonable doubt that the defendant committed the offenses
17 charged, irrespective of whether other persons may have
18 communicated the same or similar information.

19 Now, we're moving on to Count 3. The defendant has
20 been charged in Count 3 of the indictment with knowingly and
21 willfully retaining national defense information while having
22 unauthorized possession of that information.

23 Count 3 charges specifically that the defendant
24 unlawfully retained a document relating to the national
25 defense, namely, a letter relating to Classified Program No. 1,

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1 at his residence beginning in or about January 31, 2002, and
2 continuing through approximately April 30 of 2003.

3 The statute, and this is another section of 793 -- of
4 Title 18, United States Code, 793(a) -- (e), 793(e), provides
5 that: Whoever having unauthorized possession of . . . any
6 document . . . relating to the national defense . . . willfully
7 retains the same and fails to deliver it to the office or
8 employee of the United States entitled to receive it . . .
9 shall be guilty of an offense against the United States.

10 And for this offense, for Count 3, there are two
11 essential elements:

12 First, that beginning in or about January 31 of
13 2012 -- that's 2002; that's a typo -- and continuing thereafter
14 through on or about April 20 of 2003, the defendant had
15 unauthorized possession or control over a document relating to
16 the national defense of the United States; and

17 Two, that the defendant willfully retained the same
18 document and failed to deliver the document to an officer or an
19 employee of the United States who was entitled to receive it.

20 The first element the government must prove for this
21 defense is that the defendant had unauthorized possession of or
22 control over information that relates to the national defense.
23 The definitions I previously provided you with respect to
24 unauthorized possession and information relating to the
25 national defense apply equally to this count.

1 The second element the government must prove beyond a
2 reasonable doubt is that the defendant willfully retained the
3 document in question and failed to deliver it to an officer or
4 employee of the United States authorized to receive the
5 document.

6 As I've instructed you already, an act is done
7 willfully if it is done voluntarily and intentionally and with
8 the specific intent to do something the law forbids, that is,
9 with a bad purpose either to disobey or disregard the law.
10 Unlike the intent element for Counts 1, 2, and 4 through 7, for
11 Count 3, the government does not have to prove that the
12 defendant acted with the intent or reason to believe that his
13 retention of the document could be used to the injury of the
14 United States or to the advantage of any foreign nation.
15 Instead, the government only must prove that the defendant
16 acted willfully as defined above.

17 Now, Count 9 of the indictment charges that between
18 on or about December 24, 2005, and on or about January 5, 2006,
19 the defendant caused to be conveyed without authority property
20 of the United States, namely, classified information about
21 Classified Program No. 1, which had a value of more than
22 \$1,000, and came into the defendant's possession by virtue of
23 his employment with the Central Intelligence Agency, to any
24 member of the general public not entitled to receive said
25 information, including foreign adversaries, through the

1 publication, distribution, and delivery of the *State of War* for
2 retail sale in the Eastern District of Virginia.

3 Title 18 of the United States Code, Section 641,
4 provides: Whoever . . . without authority sells, conveys, or
5 disposes of any record, voucher, money, or thing of value of
6 the United States or of any department or agency thereof, or
7 any property made or being made under control for the United
8 States or any department or agency thereof . . . shall be
9 guilty of an offense against the United States.

10 And there are four essential elements for this
11 offense. Again, the government must prove each and every one
12 of these beyond a reasonable doubt:

13 First, that the defendant conveyed a thing of value
14 of the United States;

15 Second, that the defendant did not have the legal
16 authority to do so;

17 Third, that the thing of value referred to in the
18 indictment was of a value greater than \$1,000; and

19 Four, that the defendant acted knowingly.

20 The word "convey" means to transfer or deliver or
21 caused to be transferred or delivered to another. The
22 term "without authority" means without actual permission from
23 someone who has the legal capacity to give permission.

24 The term "value" can mean face value, par value,
25 market value, or cost price, either wholesale or retail,

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1 whichever is greater. A thing of value can be any thing,
2 including oral information or intangible property, that has
3 value.

4 An individual acts knowingly if he was conscious and
5 aware of his actions, realized what he was doing or what was
6 happening around him, and did not act because of ignorance,
7 mistake, or accident. Thus, if the defendant acted in good
8 faith, he cannot be guilty of the crime. The burden to prove
9 intent, as with all other elements of the crime, rests with the
10 government.

11 Intent or knowledge may not ordinarily be proven
12 directly because there's no way of directly scrutinizing the
13 workings of the human mind. In determining what the defendant
14 knew or intended at a particular time, you may consider any
15 statements made or acts done or omitted by the defendant and
16 all other facts and circumstances received in evidence that may
17 aid in your determination of the defendant's knowledge or
18 intent. You may infer, but you certainly are not required to
19 infer, that a person intends the natural and probable
20 consequences of acts knowingly done or knowingly omitted. It
21 is entirely up to you, however, to decide what facts are proven
22 by the evidence received during this trial.

23 Intent and motive are different concepts and should
24 not be confused. Motive is what prompts a person to act or
25 fail to act. Intent refers only to the state of mind with

1 which the act is done or omitted.

2 Good motive alone is never a defense where the act
3 done or omitted is a crime. The motive of the defendant is
4 therefore immaterial except insofar as evidence of motive may
5 aid in the determination of state of mind or the intent of the
6 defendant.

7 This is now the last count that you have to consider:
8 Count 10 of the indictment charges that the defendant knowingly
9 and corruptly destroyed the March 10, 2003, e-mail from himself
10 to James Risen that had a link to a CNN article about the
11 Iranian nuclear weapons program. The defendant is alleged to
12 have deleted this e-mail from his e-mail account with the
13 intent to impair the e-mail's integrity and availability for
14 use in an investigation before a federal grand jury empaneled
15 in the Eastern District of Virginia between approximately April
16 18, 2006, and July 28, 2006.

17 Title 10 involves a violation of section 1512(c) of
18 Title 18 of the United States Code, which provides in part:
19 Whoever corruptly alters, destroys, mutilates, or conceals a
20 record, document, or other object, or attempts to do so with
21 the intent to impair the object's integrity or availability for
22 use in an official proceeding; or otherwise obstructs,
23 influences, or impedes any official proceeding, or attempts to
24 do so, shall be guilty of an offense against the United States.

25 There are three essential elements, again, all of

1 which must be proven beyond a reasonable doubt in order for
2 there to be a conviction on Count 10.

3 First is that the defendant altered, destroyed,
4 mutilated, or concealed a record, document, or other object, or
5 attempted to do so, or otherwise obstructed, influenced, or
6 impeded an official proceeding;

7 Two, that the defendant did so with the intent to
8 impair the object's integrity or availability for use in an
9 official proceeding; and

10 Third, that the defendant did so corruptly.

11 The document destroyed need not, need not be material
12 to the official proceeding.

13 An "official proceeding" means any proceeding,
14 including an investigation before a federal grand jury.

15 To act "corruptly" as that word is used in these
16 instructions means to act voluntarily and deliberately and for
17 the purpose of improperly influencing, or improperly
18 obstructing, or improperly interfering with the administration
19 of justice. The defendant's conduct must have the natural and
20 probable effect of interfering with the due administration of
21 justice. The government, however, does not have to prove that
22 the act of obstruction in fact obstructed the official
23 proceeding or was successful.

24 In addition to the elements of the specific charges
25 which the government must prove beyond a reasonable doubt, as

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1 to each charge, the government must also establish the venue of
2 that charge in the Eastern District of Virginia because a
3 defendant has a right to be tried in the district where the
4 offense was committed.

5 Although, although the government has the burden to
6 prove venue, it is not required to prove venue beyond a
7 reasonable doubt. Rather, the government must establish venue
8 by a preponderance of the evidence, which is a lower standard
9 of proof and requires that it is more likely than not that at
10 least one act in furtherance of that offense occurred in the
11 Eastern District of Virginia. The government must establish
12 venue as to each charged offense.

13 If the government fails to establish venue for a
14 particular charge, the jury must acquit the defendant of that
15 charge.

16 I instruct you that you must presume the defendant to
17 be innocent of the crimes charged. Thus, the defendant,
18 although accused of crimes in the indictment, begins the trial
19 with a clean slate, that is, with no evidence against him. The
20 indictment, as you already know, is not evidence of any kind.
21 The defendant is, of course, not on trial for any act or crime
22 not contained in the indictment. The law permits nothing but
23 legal evidence presented before the jury in court to be
24 considered in support of any charge against the defendant, and
25 the presumption of innocence alone therefore is sufficient to

1 acquit the defendant.

2 The burden is always upon the prosecution to prove
3 guilt beyond a reasonable doubt. That burden never shifts to
4 the defendant for the law never imposes upon a defendant in a
5 criminal case the burden or duty of calling any witnesses or
6 producing any evidence. The defendant is not even obligated to
7 produce any evidence by cross-examining the witnesses for the
8 government.

9 It is not required that the government prove guilt
10 beyond all possible doubt. The test is one of reasonable
11 doubt. And I can't give you a definition for that term. Those
12 are not technical legal terms. English language.

13 Unless the government proves beyond a reasonable
14 doubt that the defendant has committed each and every element
15 of the offenses charged in the indictment, you must find the
16 defendant not guilty of the offenses. If the jury views the
17 evidence in the case as reasonably permitting either of two
18 conclusions, one of innocence and one of guilt, the jury must,
19 of course, adopt the conclusion of innocence.

20 Now, this is the last instruction, and I know you've
21 been with this for almost an hour. Upon retiring to the jury
22 room to begin your deliberations, you will elect one of your
23 members to act as your foreperson. The foreperson will preside
24 over your deliberations, will be your spokesperson here in
25 court, and will sign the verdict form on your behalf.

1 Your verdict must represent the collective judgment
2 of the jury. In order to return a verdict, it is necessary
3 that each juror agree to it. That is what unanimity means. In
4 other words, your verdict must be unanimous.

5 It is your duty as jurors to consult with one another
6 and to deliberate with one another with a view towards reaching
7 an agreement if you can do so without violence to your
8 individual judgment. Each of you must decide the case for
9 yourself, but do so only after an impartial consideration of
10 all the evidence in the case with all the other jurors. In the
11 course of your deliberations, do not hesitate to reexamine your
12 own views and to change your opinion if convinced it is
13 erroneous. Do not surrender your honest conviction, however,
14 solely because of the opinion of the other jurors or for the
15 mere purpose of returning a verdict.

16 Remember at all times you are not partisans. You
17 don't represent the government; you don't represent the
18 defendant. Instead, you are judges, specifically, judges of
19 the facts of this case. And your sole interest is to seek the
20 truth from the evidence received during the trial.

21 Your verdict must be based solely upon the evidence
22 received in the case. Nothing you have seen or read outside of
23 court may be considered. Nothing that I have said or done
24 during the course of this trial is intended in any way to
25 somehow suggest to you what I think your verdict should be.

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1 The punishment provided by law for the offenses
2 charged in the indictment is a matter exclusively within the
3 province of the Court and should never be considered by the
4 jury in any way in arriving at an impartial verdict as to the
5 offenses charged.

6 Nothing said in these instructions and nothing in the
7 verdict form prepared for your convenience is to suggest or
8 convey to you in any way or manner any intimation as to what
9 verdict I think you should return. What the verdict shall be
10 is the exclusive duty and responsibility of the jury. As I've
11 told you many times before, you are the sole judges of the
12 facts.

13 Now, a verdict form has been prepared for your
14 convenience, and you will notice that it skips from Count 7 to
15 Count 9. There is no Count 8 at issue in this case, so don't
16 worry about the missed number.

17 You will take this verdict form to the jury room, and
18 when you have reached your unanimous agreement as to your
19 verdict, the foreperson will write your verdict, date and sign
20 the form, and return with your verdict to the courtroom.

21 Let me go over the verdict form with you right now.
22 So it begins with the caption of the case, United States of
23 America v. Jeffrey Alexander Sterling, and it has the case
24 number, and then we've listed each count.

25 Count 1 -- and you can go back to the jury

1 instructions and find exactly what that count is referring to.
2 And it just says: "With respect to Count 1, unauthorized
3 disclosure of national defense information," and then it has
4 the code section, "we, the jury, unanimously find the
5 defendant, Jeffrey Alexander Sterling," and there are two
6 choices: Guilty/Not Guilty. "G" comes before "N," so the fact
7 that Guilty is listed first in no respect suggests that that
8 should be your answer, but we have to put the thing someplace,
9 and alphabetical seems as easy as any other way of doing it.

10 And then we go through each count that way, so then
11 there's a separate line for Count 2. Each one of these counts
12 gets an individual evaluation and individual decision, and
13 again, any decision as to any count must be unanimous.

14 At the very end then, the foreperson will date the
15 verdict form with the date the decision, the final decision is
16 made. We'll ask the foreperson to sign his or her name and
17 then please print it underneath since we often can't read your
18 signatures.

19 Now, you will take this verdict form into the jury
20 room. You will also have all of the physical exhibits that
21 were entered into evidence, and I asked the attorneys to
22 provide you with an index of those, so you'll have the exhibit
23 number and a little title of what the exhibit is to help you
24 find them because you have a lot of evidence in this case.

25 I will also, I have to correct a few typos, but I

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1 will have for you a couple of copies of these written jury
2 instructions as well so you can refresh yourselves as to any
3 matter that we've talked about in these instructions. You may
4 take your notebooks with you as well.

5 If it becomes necessary during your deliberations to
6 communicate with the Court, you may send a note signed and
7 dated by your foreperson or by any of the other members of the
8 jury, and you do that by knocking on the door and giving the
9 note folded over to Mr. Wood, my court security officer. Of
10 course, he is forbidden to communicate in any way or manner
11 with any member of the jury on any subject touching the merits
12 of the case.

13 No member of the jury should ever attempt to
14 communicate with the Court by any means other than a signed
15 writing, and the Court will never communicate with any member
16 of the jury on any subject touching the merits of the case
17 other than via writing or orally here in court.

18 Also, please bear in mind that you are never to
19 reveal to any person, not even the Court, how the jury stands
20 numerically or otherwise on any issue until after you've
21 reached the unanimous verdict.

22 All right, counsel, approach the bench.

23 (Bench conference on the record.)

24 THE COURT: All right, you may have noticed as I read
25 I'm going to switch the word "communicate" on two of those

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1 instructions. That's how I read them. They're just typed
2 wrong, okay, for those counts. Because we were using the word
3 "communicate" rather than "disclose."

4 MR. OLSHAN: That's fine.

5 THE COURT: Any objection from the government to the
6 charge that's just been given to the jury?

7 MR. OLSHAN: No, Your Honor.

8 MR. TRUMP: No.

9 THE COURT: Are there any changes, corrections,
10 anything you want the Court to change?

11 MR. OLSHAN: No.

12 THE COURT: No?

13 How about the defense? Other than the objections
14 you've already put on the record, are there any additional
15 objections to the charge other than what you've already
16 objected to?

17 MR. MAC MAHON: No, Your Honor.

18 THE COURT: Are there any additional things you want
19 me to tell the jury?

20 MR. MAC MAHON: No, Your Honor.

21 THE COURT: We're set to go then, right?

22 MR. MAC MAHON: We have to get rid of two jurors.

23 THE COURT: I know. We have to do the alternates.
24 That's the next thing, okay. The practice here is that
25 Ms. Guyton should have all 14 jurors' names in the box. Are

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1 you ready to do it?

2 Is everyone watching? All right.

3 No, you do it.

4 All right, who is that? All right, the first one is
5 David Harrison, Juror No. 42, all right? So he's the alternate
6 No. 1. And the second one is Suzanne Yerks, Juror No. 101.

7 She's No. 2. All right?

8 Why don't you go back, and I'll excuse them.

9 MR. MAC MAHON: Thank you, Your Honor.

10 (End of bench conference.)

11 THE COURT: Now, ladies and gentlemen, I know you've
12 been a very smart and attentive jury, and I bet at least one of
13 you has been wondering, There are 14 of us, but juries are only
14 made up of 12 people. It turns out two of you have been
15 selected to be alternates, and, Mr. Harrison, you're alternate
16 No. 1; Ms. Yerks, you are alternate No. 2.

17 Where's Ms. Yerks?

18 (Juror Yerks raised hand.)

19 THE COURT: I want to first of all tell you folks we
20 really appreciate the time you've spent listening to this case.
21 Now, your job is not over yet. You will not be able to
22 deliberate with the 12 people who remain in the jury. We have
23 to have alternates because should any of you have had a family
24 emergency or, you know, get sick, the flu is around, and would
25 have been unable to come to the courthouse, we have to have 12

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1 jurors in a criminal case. We would have had enough extra
2 people here to make sure we could get this case finished, but
3 at this point, I can't have more than 12 people in the jury
4 room.

5 If, however, during the course of the deliberations a
6 juror should get ill or for some reason before the jury is
7 finished we lose somebody, then, Mr. Harrison, we would call
8 you to come back in. And, Ms. Yerks, if we lost two jurors,
9 then we'd have to call you back in.

10 Therefore, it's extremely important, and I know this
11 is terribly unfair, but I have to keep you under the same
12 caution: You must still continue to avoid any publicity about
13 this case. It was discussed on the first page of *The*
14 *Washington Post* this morning, so stay away from the paper or at
15 least go to the sports section. Do not discuss this case.

16 The 12 of you can't e-mail or send any notes or have
17 any communication with your two former colleagues.

18 If you will leave your phone numbers with Ms. Guyton,
19 we will call you so that you know either that we need you back
20 here or the case is over so that you can then read the paper,
21 and other than anything you might remember about those three
22 classified exhibits, there's nothing that prohibits you from
23 talking about this case, although again, you may want to
24 respect the thoughts of your fellow jurors and not.

25 But at this point, we're going to let Mr. Harrison

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1 and Ms. Yerks go. Leave your notebooks here. We'll keep them
2 so that should you have to come back and deliberate -- and as I
3 said, do leave us a note with your phone number on it, okay?
4 And I think we can let you folks go right now, all right?
5 Thank you. We'll stay in session for another minute.

6 You should check out with the Clerk's Office,
7 Ms. Yerks and Mr. Harrison. Let them know that you are
8 alternates so that you're not going to be coming back unless we
9 have to call you back, and just leave your phone numbers,
10 unless we already have them.

11 Is there a problem?

12 (Discussion off the record between the Court and the
13 Court Security Officer.)

14 THE COURT: All right. Well, you're going to get a
15 break now anyway, so what we'll do is this: We're going to
16 give you your afternoon break. What I would like you to do,
17 once the two alternates have left, so you need to step outside
18 while this is being done, the 12 of you decide who wants to be
19 the foreperson, all right? And then if the foreperson could
20 let me know in a written note how long a break you want to
21 take, all right? During that time, Ms. Yerks can retrieve her
22 cell phone from the car of one of the rest of you, all right?

23 And then you might want to decide how long you want
24 to deliberate today. There's -- once a jury starts
25 deliberating, the schedule can change dramatically. If you

1 want to stay past 5:30, that's fine. If you're going to stay
2 much later than that, I need to know so I can keep some heat on
3 in the room for you. If you want to stop at 5:30, which has
4 been our normal time, that's also fine.

5 You should know also that if you have a question, I
6 can't answer your question without running it by the attorneys,
7 and so I require at least one lawyer per side to always stay in
8 my courtroom. That does mean, however, that if you are going
9 to be on a break, I can let those lawyers leave the courtroom
10 for that time period.

11 So anytime you take a lunch break or a coffee break,
12 I want you to let me know, you know: We're breaking at this
13 time for 15 minutes, and that way I'll let everybody go so that
14 we don't waste your time. If you have a question and I have to
15 track lawyers down, you know, you might wait a half an hour for
16 an answer, and we don't want to do that, all right?

17 You also might want to think about what time you want
18 to start tomorrow morning. As I told you, I have other matters
19 unrelated to this case in my courtroom. You'll be my first
20 priority, but the point is you can start at 9:00, you can start
21 at 8:30, frankly, whenever you want to start, but you can't
22 start until you're all together.

23 Jury deliberation is a collaborative process, and it
24 means that each of you must be listening to the other
25 discussing the evidence, so if someone's in the restroom, you

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1 should stop deliberating. If someone's run downstairs to get a
2 coffee, you've got to stop deliberating because it's important
3 that you hear each other, all right?

4 All right, we're going to let the jury go now, and if
5 you'd let us know who's going to be the foreperson, how long a
6 break you want, that will be just fine.

7 We'll recess court.

8 (Recess from 2:46 p.m., until 4:22 p.m.)

9 (Defendant present, Jury out.)

10 THE COURT: Well, I told you-all this was a smart
11 jury. I just, I love the questions that we get. It shows that
12 they're reading and thinking.

13 All right, the answer for the first question is easy.
14 "The jury would like further clarification on 'venue' (page 56
15 of the jury instructions). More directly, Count 10, how is
16 venue determined?"

17 And there is a Fourth Circuit case that I think is
18 right on point. It's *Rodriguez-Moreno and Bowens v. United*
19 *States*, but they both seem to hold the proposition that venue
20 is proper in the district where the effects of the offense
21 would be felt, concluding that because the effects of the
22 materially false statements were felt by those conducting a
23 federal investigation in Maryland, venue was proper in that
24 district.

25 So the effect for Count 10 would be felt by the grand

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1 jury in the Eastern District of Virginia, and that's why that's
2 a relatively easy answer.

3 MR. TRUMP: Yes, it's --

4 THE COURT: Because they're specifically concerned
5 about Count 10.

6 MR. TRUMP: Yeah, it's in the statute, Judge. A
7 prosecution under this section may be brought in the district
8 in which the official proceeding was intended to be affected.

THE COURT: That's even easier. Hold on a second.

10 (Laughter.)

11 THE COURT: Always start with the statute. You're
12 correct, Mr. Trump. All right, let me -- what's our code
13 section for that?

14 MR. TRUMP: 1512(g) -- excuse me, (h)(i).

15 THE COURT: All right, 1512(g)?

16 MR. TRUMP: (H).

17 THE COURT: I'm sorry, (h).

18 MR. TRUMP: 1512(h)(i). Excuse me, it's just -- I'm
19 misreading that. It's 1512(i).

20 THE COURT: Correct, you're right. So a prosecution
21 under -- the prosecution under Count 10 may be brought in the
22 district in which the official proceeding was intended to be
23 affected, all right? Or in the district. So I'm going to read
24 it that way, all right? That's from the statute.

25 And I think that's the only answer they are

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1 requesting at this point.

2 MR. MAC MAHON: Well, Your Honor, if I may, I think
3 that the question about clarification on venue, I know they're
4 just asking about Count 10 here, and, and I think that the
5 instruction that we proffered before about where the element of
6 these other offenses where the information was disclosed or
7 where somebody was when they heard it is the proper venue in
8 the 793 counts, and I think that's what they're asking as well,
9 and I think that's what they should be told.

10 THE COURT: Well, I'm not going to go beyond the
11 specifics of the question, and because they did it
12 specifically, I'm going to address that. If they have further
13 questions, they are not going to be shy about coming back, all
14 right?

15 MR. MAC MAHON: Your Honor, your answer is just,
16 you're going to be very clear that it pertains only to Count
17 10?

18 THE COURT: To Count 10, yes. All right?

19 MR. MAC MAHON: It doesn't affect venue for any other
20 count.

21 THE COURT: Correct. I will say, though, in doing a
22 quick check of my book on Fourth Circuit criminal law, the
23 concept on venue does seem to be very statute specific, so I
24 suggest since this issue may come up again, the government --
25 both sides may want to do some specific research on these -- on

1 the other counts for venue issues.

2 Again, what I said years ago in the context of, you
3 know, deciding on the Risen issue is not necessarily a complete
4 or full instruction. That was never the intention of the Court
5 back then. You've been citing me to me. I'm not reversing
6 myself; I just want to -- there must be other judges who have
7 also addressed the issue of venue for these statutes, maybe
8 not.

9 MR. MAC MAHON: We'd like the cite Brinkema on venue,
10 Your Honor.

11 THE COURT: Yeah, Brinkema on venue, right.

12 But anyway, let's get the jury in. They want to go
13 home at 5:15 tonight. I will bring them in here before I send
14 them home.

15 MR. OLSHAN: Your Honor?

16 THE COURT: Yeah.

17 MR. OLSHAN: There was a second question that just
18 came out?

19 THE COURT: Yeah. They want to stick sticky notes on
20 the wall, all right? We're telling them they can't do that.
21 They have to use the board.

22 We're giving you every note that we get, and I
23 don't -- if you didn't get those yet --

24 MR. OLSHAN: I think it literally just came out as
25 the Court was coming out.

1 THE COURT: Yeah. Do you like our snazzy new forms?
2 We're giving them some structure. Okay.

3 | (Jury present.)

4 THE COURT: Again, folks, you can really sit anywhere
5 in the box where you're comfortable. That's all right. You
6 like your seats. Have a seat, please.

I was just telling the attorneys I knew you were a sharp jury, and that was a very smart question you sent. Let me address the easier question. You can have all the Post-it notes you want, but you can't put masking tape on my walls, okay?

12 A JUROR: I thought you might say that.

13 THE COURT: Okay. You can put masking tape on the
14 tripod; you know, we've given you an easel; and the sticky
15 notes, the Post-it notes won't hurt the walls. I don't care if
16 you want to put those on the walls, all right? But, you know,
17 it's government property. You don't want to be destroying it.
18 All right.

19 Now, in terms of the substantive question, you've
20 asked: "The jury would like further clarification on 'venue.'
21 More directly, Count 10, how is venue determined?"

22 I understand that's your question. And for Count 10,
23 which is again the obstruction charge, that's actually -- the
24 venue provision is actually in the statute, and I probably
25 should have given that to you. So a prosecution under this

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1 section may be brought in the district in which the official
2 proceeding (whether or not pending or about to be instituted)
3 was intended to be affected or in the district in which the
4 conduct constituting the alleged offense occurred.

5 And what I'll do is I'm going to photocopy just that
6 section to give to the jury so they have it as an additional
7 instruction along with the other ones.

8 Any objection to doing that?

9 MR. MAC MAHON: No objection.

10 MR. TRUMP: (Shaking head.)

11 THE COURT: All right. So this additional
12 instruction, I'll put another -- I'll put it in the, give you a
13 page number so it's sort of logical, and it will say for Count
14 10, so you don't mix it up with anything else, but for Count
15 10, there's actually a statutory provision, all right? And
16 I'll get that to you, all right?

17 The other thing is, folks, I know you want to leave
18 at 5:15 today, and that's fine, but our, our practice will be
19 before any session is ended for the day, I always want to bring
20 you back in just to make sure I remind you about, you know, how
21 you have to behave from here on out, all right?

22 So we'll recess court to await your decision.

23 (Recess from 4:30 p.m., until 5:18 p.m.)

24 (Defendant and Jury present.)

25 THE COURT: Ah, the jury has indicated they want to

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1 start at 8:30 tomorrow morning, bright and early, so I'll
2 require at least one attorney for each side to be in the
3 courtroom. That's great, ladies and gentlemen.

4 Now, it's pretty cold in the courtroom right now.
5 Was the jury room comfortable when you were in there?

6 (Jurors nodding heads.)

7 THE COURT: All right. Don't be -- you won't be shy,
8 I don't even have to say that, about sending us notes. The
9 temperature is tough to keep under control, but we'll try to
10 make it as comfortable for you as possible.

11 All right, so I'm going to send you home for the
12 evening. Please remember my cautions: You must not try to
13 communicate with each other or your two former colleagues.
14 Don't discuss this case with anyone. Again, some of your
15 family may know what case you're sitting on. If they want to
16 talk to you about the article in *The Post* or anything else,
17 you've got to tell them, "Judge said absolutely no." Do not do
18 it.

19 And don't take any of the evidence home with you.
20 You can't be studying it overnight. If you're reading the
21 chapter, Exhibit 132, you need to read it here in the jury
22 room.

23 So just -- you've been a great jury. Don't let
24 anything mess up our case at this point. And we'll see you
25 back here at 8:30. I'm not going to bring you back into court.

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1 You can just report to the jury room, and once all 12 of you
2 are there, you can start deliberating. Again, until you're all
3 12 in the room, you can make pleasantries about the weather or
4 the upcoming weekend, but do not discuss the case, all right?
5 Thank you. We'll let you-all go.

6 I'll stay in session for a few minutes.

7 MR. MAC MAHON: Thank you, Your Honor.

8 (Jury out.)

9 THE COURT: Mr. MacMahon, you had an issue you wanted
10 to raise?

11 MR. MAC MAHON: Yes, Your Honor. You invited us to
12 go do some more research on the venue question.

13 THE COURT: Yeah.

14 MR. MAC MAHON: And --

15 THE COURT: Have you shared your results with the
16 government, or are they hearing it for --

17 MR. MAC MAHON: It's hot off the press, Your Honor.

18 THE COURT: All right.

19 MR. MAC MAHON: And I'm happy to share it with them
20 now as well, and I have a copy for you, but the *Truong*, I think
21 it's the *Truong* case --

22 THE COURT: Oh, that's an old case out of the Vietnam
23 War, yep.

24 MR. MAC MAHON: Well, this, this -- we have a copy
25 for the Court as well.

1 THE COURT: All right, if you'd give it to Mr. Wood?

2 Yeah.

3 They have an exhibit for me.

4 MR. MAC MAHON: Judge, it's footnote 11. The way
5 this printed out is not -- but this is *U.S. v. Truong*,
6 T-r-u-o-n-g.

7 THE COURT: I know the case. I was around in those
8 days, yeah.

9 MR. MAC MAHON: I was just giving it for the court
10 reporter, Your Honor. I was getting that look from the court
11 reporter.

12 THE COURT: Oh, I'm sorry. Go ahead.

13 MR. MAC MAHON: And it's 629 F.2d 908.

14 But, Judge, in footnote 11 in the *Truong* case, there
15 was -- and this was a search for venue questions in espionage,
16 and this was a 793 conviction and a 794 case, but what the
17 Fourth Circuit did in affirming in that case was language in a
18 footnote which is found on page 18, footnote 11 -- and it came
19 out double-sided; I'm sorry, Your Honor -- but the defendant in
20 that case complained about venue in an espionage case, and
21 there's the language about how it's constitutional and why it's
22 important that venue be established since the defendant has the
23 right to be charged in the district where the crime occurred,
24 and it says in 11 that since Krall was the means by which the
25 documents were carried to the Vietnamese in Paris, the

1 proscribed act, the act of transmission took place in
2 Alexandria.

3 So in that case, albeit in a footnote, there is a
4 Fourth Circuit opinion that says the proscribed act under 793
5 is the act of transmission, which is what we've been arguing to
6 the Court. It's not all the other peripheral instances that
7 happened or may have happened in this case or even in the
8 *Truong* case.

9 And the cite there is to *U.S. v. Walden*, which I
10 think you cited to us a couple days before, and the *Walden*
11 case, which we pulled up, also, deals with how it's -- it is
12 element specific, the acts of venue, because of the
13 constitutional right to be tried in the, in the district where
14 the crime is committed. They cite --

15 THE COURT: But, you know, the other issue -- and
16 again, I'm going to let the government research this overnight.
17 It's early enough in the jury's deliberations if we have to
18 refine the venue instruction, it's not going to be a problem,
19 but there's also a pretty well-established principle that
20 where, where a -- where the effects of a crime are felt can be
21 part of the continuity of venue. I mean, again, the government
22 has alleged that these disclosures, among the places where
23 there was an unlawful disclosure are here in Virginia.

24 MR. MAC MAHON: All right, Judge. There's a couple
25 counts that deal with that but not every count, and really, I

1 don't think that in -- if the government needs time to research
2 it, it's fine, but what these, what these cases are saying is
3 that it's the proscribed act in the case. It's not an
4 ephemeral concept that we decide where, where a crime -- in
5 very few cases is there an issue of venue. Normally in all of
6 our plea agreements or cases we have, someone says, "I was in
7 the Eastern District of Virginia." It's never an issue in
8 almost any case that we've ever had -- that I've ever had in
9 front of you. I've never had the issue come up.

10 THE COURT: But I've had the issue come up. I
11 mentioned a couple examples to you yesterday.

12 MR. MAC MAHON: But I don't, I don't believe -- I
13 think when you read *Walden* and you read this *Truong* case, that
14 you have to find an act that was element specific. It says in
15 this *Truong* footnote --

16 THE COURT: Wait. But why is not at least, for
17 example, causing the disclosure or causing the communication --
18 part of the problem is the communication occurs, part of the
19 communication is in the Eastern District of Virginia. That is,
20 when the book enters Virginia, there has been --

21 MR. MAC MAHON: And that's very few counts, Judge.

22 THE COURT: I'm sorry?

23 MR. MAC MAHON: Not every count deals with the
24 publication of the book in Virginia.

25 THE COURT: No, I recognize that.

1 MR. MAC MAHON: There's attempts. There's conveyance
2 of property. There's other counts that it's possible you
3 could -- I mean, we would again renew the Rule 29 on this
4 issue, and I don't expect the Court to grant it at this time,
5 but there isn't any evidence of transmission of this
6 information. The four phone calls add up to about a minute,
7 and it has to be element-specific.

8 It can't just be the sale of the book. If it's just
9 the sale of the book, then every count but that has to go out
10 because there isn't any evidence of venue, and that was the
11 instruction that we gave you before, which is they have -- the
12 government has to prove where the act of transmission or
13 receipt took place here in the Eastern District of Virginia,
14 and there's no evidence of that whatsoever.

15 THE COURT: All right, what I'm going to do, I mean,
16 the jury has this case now.

17 Mr. Trump, are you ready to respond?

18 MR. TRUMP: Your Honor, in the *Truong* case, it was a
19 conspiracy case, and Truong and Humphrey were coconspirators.

20 THE COURT: I know.

21 MR. TRUMP: They were arguing the case that they
22 should have been charged in D.C. because that's where the
23 conspiracy was located, but they were prosecuted in Virginia
24 because they transferred the documents to the unwitting person
25 who then flew to Paris from Virginia.

1 So it was a question of in that case, that the
2 defendant was claiming I should have been charged in D.C., and
3 the court said no, there was an act of transmission occurring
4 in Virginia. You could have been charged in D.C., but you
5 weren't. You were charged in Virginia.

6 So it's not, it's not a definitive statement that the
7 only place the case could have been charged was in Virginia.

8 THE COURT: And the even more general proposition of
9 law was that there was an act in furtherance of the conspiracy
10 that occurred in the Eastern District of Virginia in that case.

11 MR. TRUMP: Well, there was also conspiracy to
12 violate 793, but even in the 793 context, it wasn't a
13 definitive statement that the only place it could have been
14 charged was, was Eastern District of Virginia, but there's also
15 a fundamental point that the jury has been instructed and we
16 argued the case based upon the proffered instruction.

17 I think at this point, if it's error, it's error, and
18 we'll find out at some point if the defendant is convicted, but
19 if we are to revise the instruction now, we can't go back and
20 reargue the case.

21 THE COURT: Well, I don't think it was that major an
22 argument in the case, but I'll let it be as it is. As I said,
23 if we get questions, we'll have to address the specific
24 questions that come up from the jury, and at this point, as I
25 said, I'm not uncomfortable with the venue instruction, and

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1 that's what it is.

2 So you've made the record, Mr. MacMahon, and I'm not
3 changing --

4 MR. MAC MAHON: We'll do more research, Your Honor,
5 if you want us to. We'll go back to the library.

6 THE COURT: I never discourage counsel from reading
7 the law; that's wonderful; but in any case, I do think, though,
8 out of fairness to the government and to the Court, you need to
9 send it to us in writing so that we have a chance to look at it
10 and not just have to, you know, think about it from the bench,
11 okay?

12 MR. MAC MAHON: We'll draft something.

13 THE COURT: All right. So tomorrow morning, 8:30.
14 We'll recess court until then.

15 (Recess from 5:28 p.m., until 8:30 a.m., January 23, 2015.)

16

17 CERTIFICATE OF THE REPORTER

18 I certify that the foregoing is a correct transcript of
19 the record of proceedings in the above-entitled matter.

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Anneliese J. Thomson

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